DOCKET

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Status: GRANTED v.
Sandra Everhart, et al.

Docketed:
February 7, 1989 Court: United States Court of Appeals for the Tenth Circuit

Counsel for petitioner: Solicitor General

Counsel for respondent: Taubman,Daniel, Olson,Linda J.

Entry	Date	Note	Proceedings and Orders
1	Feb 7 1989	G	Petition for writ of certiorari filed.
2	Mar 15 1989		DISTRIBUTED. March 31, 1989
3	Mar 28 1989	F	Response requested -- CJ, SOC.
4	Apr 26 1989		Brief of respondents Sandra Everhart, et al. in opposition filed.
5	Apr 26 1989	G	Motion of respondents for leave to proceed in forma pauperis filed.
6	May 2 1989		REDISTRIBUTED. May 18, 1989
7	May 10 1989	X	Reply brief of petitioners Newman, et al. filed.
8	May 22 1989		Motion of respondents for leave to proceed in forma pauperis GRANTED.
9	May 22 1989		Petition GRANTED.
			**********
11	Jun 28 1989		Order extending time to file brief of petitioner on the merits until July 27, 1989.
13	Jul 24 1989	G	Motion of the Solicitor General to dispense with printing the joint appendix filed.
12	Jul 27 1989		Brief of petitioners Louis W. Sullivan, et al. filed.
14	Jul 27 1989		Brief of petitioners Newman, et al. (TBP) filed.
16	Aug 21 1989		Order extending time to file brief of respondent on the merits until September 21, 1989.
17	Sep 7 1989		Record filed.
		*	Certified copy of original record, volumes I & II, and C.A. Proceedings received.
18	Sep 21 1989	G	Motion of the Solicitor General to permit Amy L. Wax, Esq., to present oral argument pro hac vice filed.
19	Sep 21 1989		Brief amici curiae of American Association of Retired Persons, et al. filed.
22	Sep 21 1989		Brief of respondents Sandra Everhart, et al. filed.
20	Sep 25 1989		Motion of the Solicitor General to dispense with printing the joint appendix GRANTED.
21	Sep 26 1989		SET FOR ARGUMENT MONDAY, NOVEMBER 27, 1989. (1ST CASE)
23	Oct 5 1989		CIRCULATED.
24	Oct 10 1989		Motion of the Solicitor General to permit Amy L. Wax, Esq., to present oral argument pro hac vice GRANTED.
25	Oct 16 1989	G	Application (A89-289) to extend the time to file a reply brief from October 21, 1989 to November 1, 1989, submitted to Justice White.
26	Oct 18 1989		Application (A89-289) granted by Justice White extending the time to file until November 1, 1989.
27	Nov 1 1989	X	Reply brief of petitioners Louis Sullivan, et al. filed.

2PP

Entry	Date	Note	Proceedings and Orders
28	Nov 27 1989		ARGUED.

PETITION FOR WRIT OF CERTIORARI

88-1323

(1)

No.

Supreme Court, U.S.
FILED
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In the Supreme Court of the United States

OCTOBER TERM, 1988

DON M. NEWMAN, ACTING SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL.

v.

SANDRA EVERHART, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTION PRESENTED

Whether Social Security regulations that require netting of all errors in a recipient's past benefit payments to determine whether there has been an overpayment subject to recovery or waiver of recovery are within the agency's statutory authority.

PARTIES TO THE PROCEEDINGS

The petitioners are the Acting Secretary of Health and Human Services and the Commissioner of the Social Security Administration. The respondents are plaintiffs Sandra and Thomas Everhart and Myron Zenick and intervenors Emil Zweizen and Berline Wise, representing a Tenth Circuit-wide class of Title II and Title XVI beneficiaries, certified by the district court, whose erroneous payments "were recovered pursuant to the Secretary's netting regulations on or after December 8, 1986" and who "have made or will make a claim to the Secretary not to have the netting policy applied in their cases" (App., *infra*, *27a*).

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In the Supreme Court of the United States

OCTOBER TERM, 1988

No.

DON M. NEWMAN, ACTING SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL.

v.

SANDRA EVERHART, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Acting Solicitor General, on behalf of the Acting Secretary of Health and Human Services, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra,* 1a) is reported at 853 F.2d 1532. The district court opinion (App., *infra,* 17a), and the district court order of class certification on remand (App., *infra,* 26a) are unpublished.

JURISDICTION

The judgment of the court of appeals was entered on August 12, 1988. A petition for rehearing with suggestion for rehearing *en banc* was denied on October 24, 1988. On

January 13, 1989, Justice White extended the time for filing a petition for a writ of certiorari to February 7, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Section 204(a)(1), 204(b), 42 U.S.C. 404(a)(1), 404(b) and Section 1631(b)(1), 42 U.S.C. 1383(b)(1) of the Social Security Act are set forth in the Appendix at 28a-~~29a~~ 31a Social Security regulations 20 C.F.R. 404.504 and 416.538 are set forth in the Appendix at ~~30a~~-35a. 31a

STATEMENT

This case concerns the validity of Social Security regulations that require the "netting" of past overpayments and underpayments of benefits before determining whether any recoupment of overpayments should be waived.

1. Each month, the Social Security Administration (SSA), a unit of the Department of Health and Human Services (HHS), mails more than 40 million checks to beneficiaries under Title II of the Social Security Act, 42 U.S.C. 401 *et seq.* (Act)—the Old Age, Survivors, and Disability Program—and Title XVI of the Act—the Supplemental Security Income (SSI) Program. Most of these checks correctly reflect the amount of benefits that the recipient is entitled to receive. In any program of this magnitude, however, mistakes are inevitable. Overpayments may occur due to inaccurate reports of actual or estimated income by beneficiaries (see 42 U.S.C. 403(a), 415), erroneous computation of statutory offsets (see 42 U.S.C. 402(j), 402(k)(3)), unreported workers' compensation benefits (42 U.S.C. 424a), administrative errors, or delays

in the termination of benefits after entitlement has ended. Underpayments may come about because of beneficiaries' inaccurate reports of actual or estimated income, delays in establishing entitlement to receive benefits, erroneous terminations, and administrative errors.

Section 204 of Title II and Section 1631(b)(1) of Title XVI, 42 U.S.C. 404 and 1383(b)(1), require the Secretary of Health and Human Services to correct errors in past payments whenever the beneficiary has received "more or less" than the amount to which he is entitled. The Title II provision, Section 204(a)(1), states that "[w]henever the Secretary finds that more or less than the correct amount of payment has been made to any person under [Title II], proper adjustment or recovery shall be made, under regulations prescribed by the Secretary." If the Secretary determines that "less than the correct amount" has been paid, the recipient is entitled to reimbursement of that amount. 42 U.S.C. 404(a)(1)(B). If a recipient has received "more than the correct amount," Section 204(a)(1)(A) permits the Secretary to "decrease any payment" under Title II to the recipient or to "require such overpaid person * * * to refund the amount." However, Section 204(b) directs that "there shall be no adjustment of payments to, or recovery by the United States" if the recipient was "without fault" and if "such adjustment or recovery would defeat the purpose of [Title II] or be against equity and good conscience." 42 U.S.C. 404(b). In *Califano* v. *Yamasaki*, 442 U.S. 682 (1979), this Court held that recipients who request a waiver under this section are entitled to an oral hearing prior to any recovery or adjustment of benefits.

The parallel SSI provision is worded somewhat differently, but is similar in purpose and effect. Section 1631(b)(1) of Title XVI states that when the Secretary finds "that more or less than the correct amount of benefits has been

paid" to a recipient, the Secretary shall make "proper adjustment or recovery." In the event that a beneficiary has been overpaid, Section 1631(b)(1)(B), 42 U.S.C. 1383(b)(1)(B), requires the Secretary to "make such provision as he finds appropriate * * * with a view to avoiding penalizing such individual * * * who was without fault," if an "adjustment or recovery * * * would defeat the purpose of this subchapter, or be against equity and good conscience, or (because of the small amount involved) impede efficient or effective administration * * *."

The Secretary has been given express authority to promulgate regulations implementing these provisions,[1] and has exercised that authority by adopting what are known as "netting" regulations. These regulations require that all overpayments and underpayments in past months be added or "netted" to yield a single payment error amount—either a net underpayment or a net overpayment. See 20 C.F.R. 404.504 and 416.538. The Title XVI payment error regulation, 20 C.F.R. 416.538, defines "[t]he amount of an underpayment or overpayment" as "the difference between the amount paid to a recipient and the amount of payment actually due such recipient for a given period." The Title II regulation, 20 C.F.R. 404.504, contains a similar definition of "[t]he amount of an overpayment or underpayment." The Title XVI regulation also defines the "period" over which any errors in monthly

[1] Section 204(a)(1) of Title II, 42 U.S.C. 404(a)(1), itself directs that proper adjustment or recovery be made "under regulations prescribed by the Secretary." Both Title II and Title XVI also contain general provisions expressly delegating to the Secretary "full power and authority to make rules and regulations and to establish procedures, not inconsistent with the provisions of this subchapter, which are necessary or appropriate to carry out such provisions * * *." 42 U.S.C. 405(a), 1383(d)(1). See *Heckler* v. *Campbell*, 461 U.S. 458, 466-467 (1982).

payments are to be taken into account to "begin[ ] with the first month for which there is a difference between the amount paid and the amount actually due for that month. The period ends with the month the initial determination of overpayment or underpayment is made." 20 C.F.R. 416.538. Thus, if the Secretary finds that a beneficiary has received an incorrect payment in the past, he is entitled to take into account all other payment errors beginning with the month the first error occurred and ending in the month the Secretary first discovers the mistake. Social Security Ruling (SSR) 81-19a (1981), provides that the "netting" period prescribed under the Title XVI regulation also applies to the calculation of a payment error amount under the Title II regulation, 20 C.F.R. 404.504.[2]

2. a. The named respondents—the three original plaintiffs and two intervenors in the proceedings below—are each entitled to receive benefits under either Title II or Title XVI. The Secretary found that each of the respond-

[2] The Title II regulation was originally promulgated in 1955, see 20 Fed. Reg. 2,662, and was amended in 1969, see 34 Fed. Reg. 14,888. The Title XVI regulation, see 40 Fed. Reg. 47,763, was first adopted in 1975 to implement Section 1631, 42 U.S.C. 1383, which was enacted as part of the Social Security Amendments of 1972, Pub. L. No. 92-603, § 109, 86 Stat. 1475. The Title XVI regulation was revised in 1985 to eliminate a provision that required netting on a quarterly basis and to adopt the current method, which requires netting over the entire period in which past errors are uncovered. See 50 Fed. Reg. 48,573.

ents had received too much money during some past months and too little money in other months, and applied the netting regulations to calculate a net past payment error for each. The three original plaintiffs were found, after netting, to have incurred net underpayments. The Secretary accordingly paid them the net amount due. In accordance with the regulations, however, they were not afforded an opportunity to request a waiver of repayment with respect to the overpayments they had previously received.

Respondents filed a class action in the United States District Court for the District of Colorado seeking declaratory and injunctive relief against the Secretary and the Commissioner of the SSA. They claimed that the Secretary's netting procedure violated the terms of the Social Security Act, and denied them due process of law under the Fifth Amendment of the United States Constitution.[3] In their view, the statute required the Secretary to segregate past overpayments and past underpayments into separate accounts, to pay over the total amount of all past underpayments, and then to apply the waiver of recoupment procedures to the total of all past overpayments.

Ruling from the bench, the district court (App., *infra*, 20a-25a) granted respondents' motion for summary judgment. Expressly disagreeing with the decision of the Third Circuit in *Lugo* v. *Schweiker*, 776 F.2d 1143 (1985), which had upheld the netting regulations against a similar challenge, the court concluded that the Secretary had accomplished an "end run * * * around both the waiver statutes and the Supreme Court's decision in *Califano* v. *Yamasaki*" (App., *infra*, 22a, quoting *Lugo* v. *Schweiker*, 776 F.2d at 1156 (Gibbons, J., dissenting)). The court remanded the respondents' claims to the Secretary for recalculation of their payment errors without using the netting method. The court further enjoined the Secretary from applying that method to any Title II and Title XVI beneficiaries in the State of Colorado.

[3] Because both courts below held that the regulations violated the statute, neither considered the constitutional challenge.

b. The court of appeals affirmed the judgment as to the named respondents.[4] Although it acknowledged that "the Act does not specify over what past time period there must be a determination of payment errors" (App., *infra*, 11a), the court observed that "the statute is not silent regarding the differential treatment of overpayments and underpayments and the mandatory waiver of recovery in appropriate instances" (*ibid.*). Quoting from Judge Gibbons' dissenting opinion in *Lugo* v. *Schweiker*, *supra*, the court found that the practice of "offsetting past overpayments against underpayments" allowed the Secretary to "effectively recover[ ] overpayments without complying with the statutorily mandated waiver of recoupment procedures" (*id.* at 10a). The court concluded that there were "inherent conflicts between the regulations and the recoupment and waiver of recoupments provisions," and held the regulations invalid for failing to require a separate calculation of total overpayments and total underpayments (*id.* at 13a).

The court of appeals rejected the Secretary's argument that elimination of the netting methodology would "result

[4] The court reversed the district court's grant of statewide injunctive relief on the ground that no class had been certified, and remanded for further proceedings (App., *infra*, 16a & n.7). On remand, the district court certified a circuit-wide class of Title II and Title XVI beneficiaries whose erroneous payments "were recovered pursuant to the Secretary's netting regulations on or after December 8, 1986" (App., *infra*, 27a) and who "have made or will make a claim to the Secretary not to have the netting policy applied in their cases" (*ibid.*). The Secretary was ordered to identify all class members by February 20, 1989 (*ibid.*).

in a much more complex system for dealing with payment errors" (App., *infra,* 11a n.5). Instead, the court found "reasonable" respondents' position that one notice containing a separate list of all overpayments and underpayments would comport with the statute, and concluded that such a requirement would impose on the Secretary "no greater burden to provide notices and hearings than that already imposed under the statute and the Supreme Court's interpretation of the waiver provisions." *Id.* at 12a n.5.

REASONS FOR GRANTING THE PETITION

The court of appeals' decision in this case will impose significant burdens on the Social Security Administration, both in terms of multiplying the number of waiver requests and hearings that must be considered, and in terms of the additional benefits that must be paid out but may never be recouped. Although the court perceived "inherent conflicts" between the netting regulations and the Social Security Act, those regulations are in fact entirely consistent with the language of both Section 204 and Section 1631(b). And even if there were any ambiguity in the statute, the court of appeals should have deferred to the Secretary's regulations, which promote administrative efficiency at the same time that they insure that no beneficiary will ever be subject to recoupment—either by withholding of future benefits or by demand for repayment—without first being afforded an opportunity to seek a waiver. As the court of appeals acknowledged, its decision is in direct conflict with decisions of the Third Circuit and the Eighth Circuit, both of which have scrutinized the netting regulations and found them lawful. *Lugo* v. *Schweiker,* 776 F.2d 1143 (3d Cir. 1985); *Webb* v. *Bowen,* 851 F.2d 190 (8th Cir. 1988). Review by this Court is therefore plainly warranted.

1. The court of appeals acknowledged that its role in reviewing the Secretary's netting regulations was a narrow one (App., *infra,* 5a): "Because the Social Security Act expressly entrusts the Secretary with the responsibility of implementing the Act by regulation, our review of the disputed regulations is limited to determining whether the regulations are arbitrary and capricious or are inconsistent with the statute." Although the court articulated the correct standard of review, see *Chevron U.S.A. Inc.* v. *NRDC, Inc.,* 467 U.S. 837, 842-844 (1984); *Heckler* v. *Campbell,* 461 U.S. 458, 466 (1983), it went seriously astray in suggesting that the netting regulations are "inconsistent with the statute." The regulations are fully consistent with both the language of the Social Security Act and Congress's equitable goals in establishing a waiver of recoupment scheme.

a. The statutory scheme makes clear that the correction of past payment errors proceeds in two steps. As set forth in the Title II provisions, the Secretary must first determine, under Section 204(a)(1), whether "more or less" than the correct amount has been disbursed. If this inquiry reveals an underpayment, then the Secretary must automatically reimburse that amount to the beneficiary. If on the other hand the threshold inquiry reveals an overpayment, then it is necessary to move to the second stage, set forth in Section 204(b). That section provides that before the Secretary may seek any "adjustment in payments to, or recovery by the United States" from a beneficiary who is without fault, he must determine whether "such adjustment or recovery would defeat the purpose of this subchapter or would be against equity and good conscience." Section 204(b).[5]

[5] Although Section 1631(b) of Title XVI, unlike Section 204 of Title II, is not divided into two subsections, the many similarities in language and function between the two provisions indicate that they should be read *in para materia.* As in Title II, the Secretary must com-

The statute thus makes plain that the provision for a waiver, set forth in Section 204(b), is triggered only by an attempt by the Secretary to seek an "adjustment or recovery." It is the attempt to recoup that gives rise to the opportunity to seek a waiver, not the threshold determination that there has been one or more overpayments. The netting regulations, which require the Secretary to afford an opportunity for a waiver in every case where he seeks to recover an overpayment, are therefore fully consistent with the statute.

The court of appeals appears to have collapsed the two statutory inquiries into a single stage, reading the statutes as if they required an opportunity for a waiver whenever there is, for one or more months in the past, an *overpayment*. This would account for the court's statement (App., *infra*, 11a) that "the statute is not silent regarding the differential treatment of overpayments and underpayments and the mandatory waiver of recovery in appropriate instances." There is nothing in either statute, however, to suggest that the identification of one or more monthly overpayments by itself triggers the opportunity for a waiver.[6] The statutes make clear that a waiver must be considered only when the Secretary seeks to make "an adjustment or recovery." In effect, the court moved the pro-

plete the determination whether "more or less" has been paid under Title XVI before taking the appropriate remedial measure.

[6] Neither Section 204(a)(1) nor Section 1631(b)(1) uses the terms "overpayment" and "underpayment" in the text of the statute (although those terms do appear in the headings). Instead, both provisions refer to the Secretary's finding that "more or less than the correct amount of benefits has been paid" to "any person" (§ 404(a)) or "with respect to any individual" (§ 1383(b)(1)(A)). This language does not suggest that different types of past mistakes should be rigorously segregated, or that the Secretary is expected to compute more than a single error amount. In fact, it suggests the contrary. The disjunctive "or" implies that the Secretary is expected to find one or the other type of error in each case.

vision for waiver of recovery from Section 204(b) to Section 204(a).

The court's holding that the netting regulations violate the statute would follow only if the terms that trigger an opportunity for a waiver—"adjustment or recovery"—necessarily included the process of reducing past excess payments by netting them against past deficient payments. There is language in the court of appeals' opinion that suggests this view. See App., *infra*, 10a ("by offsetting overpayments against underpayments, the SSA has effectively recovered overpayments without complying with the statutorily mandated waiver of recoupment procedures"). And that was clearly the premise of Judge Gibbons' dissenting opinion in *Lugo* v. *Schweiker*, on which the court below heavily relied. See 776 F.2d at 1154 (footnote omitted) ("No recovery means no recovery by setoff, and no recovery by suit; no recovery at all."). The language and history of the waiver provisions make plain, however, that the words "adjustment or recovery" were intended to refer only to (i) the withholding of future benefits ("adjustment") or (ii) a legal demand for payment from the recipient or his estate ("recovery").[7] There is no sugges-

[7] Section 1631(b)(1) in fact describes "adjustments" more fully as "appropriate adjustments in *future* payments to such individual * * * " (emphasis supplied). Thus, an "adjustment" cannot be an offset against *past* underpayments. And Section 204(a) describes a "recovery" more fully as "requir[ing] such overpaid person or his estate to refund the amount in excess of the correct amount * * *." This is language strongly suggestive of a legal demand for payment out of a beneficiary's separate assets.

The history of the payment error provisions confirms these inferences drawn from the text. As originally enacted, the Social Security Act of 1935 permitted the government to recover overpayments of old-age benefits only by demanding repayment from the estate of recipients upon their death. See Pub. L. No. 74-271, § 206, 49 Stat. 624. This section was modified in 1939, see Pub. L. No. 76-379, 53 Stat. 1368, and renumbered as Section 204, to permit recoupment of excess payments during the beneficiary's lifetime. The 1939 version of

tion in these materials that either of these terms was intended to encompass reductions of overpayments by offsets against past underpayments.

b. Even if there were some ambiguity about the meaning of "adjustment or recovery," the court of appeals

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Section 204(a) expressly authorized only one method of recoupment – "proper adjustment" by means of "increasing or decreasing subsequent payments to which such individual is entitled." By defining "adjustment" in terms of modification of *subsequent* benefits, Congress plainly indicated that an "adjustment" referred only to withholding from future benefits.

At the same time, Congress was concerned about the possible hardship that withholding of future benefits might create, and therefore added Section 204(b) to allow a waiver in appropriate circumstances when the Secretary sought to make an "adjustment or recovery." Since the only two methods of recoupment that then existed were withholding of future benefits and a demand for payment from the recipient's estate, "adjustment" clearly referred to the former and "recovery" to the latter. This was confirmed by the Senate Report, which explained that Section 204(b) was intended to "waive[ ] any right of the United States to recover by legal action or otherwise in any case of incorrect payments" to individuals without fault. S. Rep. No. 734, 76th Cong., 1st Sess. 51 (1939).

In 1967, Congress amended Section 204 to enact the present version. Noting that the prior version of Section 204(a), by authorizing only withholding of future benefits and recovery from an estate, had created a loophole in cases where the recipient was still alive but benefits were no longer being paid, Congress added an additional method of recovery: a "refund." See S. Rep. No. 744, 90th Cong., 1st Sess. 94 (1967) ("Under the bill, the Secretary would have authority in any case where there has been an overpayment of cash benefits, to recover the overpayment by requiring a refund or by withholding the cash social security benefits [to anyone] getting benefits on the same earnings record, whether or not the overpaid person is alive."). See also *id.* at 257. The Report thus makes clear what is apparent from the statute itself: the terms "adjustment" and "recovery" refer respectively to the prospective remedial measures of (i) withholding of future benefits or (ii) legal action to recover a refund, either from a living recipient or from an estate.

should not have resolved that ambiguity simply by adopting its own preferred answer to the interpretative question. When a court "determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction of the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Chevron,* 467 U.S. at 843 (footnote omitted).

Here, there can be no doubt that the Secretary's netting regulations are at the very least a "permissible" construction of the statute. Not only does the phrase "adjustment or recovery" permit of a construction consistent with the netting procedure, but the operative terms that define when there has been an overpayment or underpayment also permit the Secretary to adopt the methodology reflected in the regulations. Section 204(a) states that "[w]henever the Secretary finds that more or less than the correct amount of payment has been made" to a recipient, the Secretary shall make "proper adjustment or recovery" as prescribed. The term "more or less" is not defined in Section 204(a) or any other section, nor does the Act say over what past period of time the payment error determination may be made. Unlike the benefit provisions of the Social Security Act, which expressly require payments "for each month," see 42 U.S.C. 402(a), 423(a), 1382(c)(1), Section 204(a) does not contain any such limitation. Thus, it was entirely proper for the Secretary to define the appropriate period for determining whether a recipient has been paid "more or less" as the entire period between the month when an error first occurs and the month when that error (as well as other subsequent errors) is detected. 20 C.F.R. 416.538.[8]

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[8] The court of appeals acknowledged that neither Section 204(a)(1) nor any other provision expressly specifies "over what past time period

Nor can there be any claim that the Secretary's construction is unreasonable. The primary purpose of the waiver provision is to protect subsistence-level beneficiaries against the hardship of having to repay a debt to the government out of their limited assets or through reduction in future benefits. This objective is consistent with Congress's general purpose in creating Titles II and XVI: to ensure that beneficiaries maintain a minimally adequate standard of living. See *Lugo,* 776 F.2d at 1152-1153; *Beatty* v. *Schweiker,* 678 F.2d 359, 363 (3d Cir. 1982). The netting regulations respect this concern no less effectively than the court of appeals' system of separate accounting. Under the netting procedure, the Secretary may *never* reduce future benefits or bring an action to collect a refund without first affording the beneficiary the opportunity to seek a waiver.

On the other hand, whereas the netting regulations insure that "netted" beneficiaries receive no less than the full amount to which the statute entitles them, the Tenth Circuit's rule requires that the Secretary deliberately make payments in excess of entitlements. Under netting, beneficiaries are automatically reimbursed for any difference between the total amount due and the amount actually paid—that is, the net underpayment. Separate accounting, in contrast, requires the Secretary automatically to reimburse all underpayments, whether or not the beneficiary has already been repaid in the form of mistaken overpayments. Thus, the court of appeals' approach will in many instances require the Secretary to make additional payments to beneficiaries who already have been effectively "paid up."

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there must be a determination of payment errors." App., *infra,* 11a. It follows that "Congress [did] not directly address[ ] the precise question at issue," *Chevron,* 467 U.S. at 843, and the court should have deferred to the Secretary's construction.

2. The court of appeals, following the dissenting judge in *Lugo* v. *Schweiker, supra,* also suggested that the Secretary's netting regulations are contrary to this Court's decision in *Califano* v. *Yamasaki,* 442 U.S. 682 (1979). But as the majority pointed out in *Lugo, Yamasaki* in fact confirms the reasonableness of the Secretary's reading of the statute. In *Yamasaki,* the Court held that disputes concerning determinations of error under Section 204(a) require less stringent procedures than waiver determinations under Section 204(b). While the Court "required a hearing for determination of imprecise [Section 204(b)] standards such as 'fault,' it noted that disputes may arise over the [Section 204(a)] calculation of overpayment but there need be no hearing to resolve them." *Lugo,* 776 F.2d at 1149. The *Yamasaki* Court thus made clear that an oral hearing is *not* a necessary prerequisite to a determination whether "more or less" than the correct amount has been paid. In holding that the Secretary's method for ascertaining error deprives recipients of a hearing to which they are entitled, the Tenth Circuit's ruling interposes a procedural requirement that this Court has held does not apply.

3. As the court of appeals expressly acknowledged (App., *infra,* 9a-10a), its decision "creat[es] a split between circuits." [9] In *Lugo* v. *Schweiker,* 776 F.2d 1143 (1985), a class action brought by an SSI beneficiary on behalf of a class of Title II and Title XVI beneficiaries, a divided panel of the Third Circuit upheld the Secretary's netting regulations. The *Lugo* court analyzed the regulations under the *Chevron* framework, and held that they reflected a reasonable exercise of the authority delegated to

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[9] In *Griffin* v. *Califano,* 448 F. Supp. 430 (N.D. Ga. 1977), the district court rejected a constitutional challenge to the netting regulations, but did not address the question of whether they violated the Social Security Act. The Fifth Circuit summarily affirmed the district court's decision. See *Griffin* v. *Harris,* 608 F.2d 1371 (1979).

the Secretary by Congress. In so ruling, the court recognized that the statute prescribes a two-stage procedure. As the court stated, "Section [204(a)] compels the Secretary to make a finding concerning the erroneous payments at issue; only afterwards does [Section 204(b)] provide a hearing and an opportunity for waiver should SSA find that an overpayment occurred." 776 F.2d at 1149 (citation and footnote omitted). The court accordingly concluded that the waiver of recoupment provision applied only to the amount of overpayment as determined under Section 204(a), and the netting practice in no way compromised the recipient's right to a hearing prior to recoupment of overpayments.[10]

Similarly, in *Webb* v. *Bowen*, 851 F.2d 190 (1988), the Eighth Circuit considered and rejected an individual social security recipient's claim that the practice of netting violated Title II.[11] The court in *Webb* agreed with the majority in *Lugo* that "Congress did not address the method to be used in determining the existence of an under or overpayment," 851 F.2d at 192, and concluded that "there is no statutory authority mandating that the Secretary use separate figures for each month, rather than the aggregate approach he has adopted." *Ibid.* As did the *Lugo* majority, the *Webb* panel construed Section 204(b) as conferring no more than the opportunity to waive "the amount found to be overpaid under section [204(a)]," and reasoned that the Secretary's method therefore deprived recipients of no procedural rights conferred by the provision for equitable waiver.

[10] The court also rejected the claim that the netting regulations violated beneficiaries' rights to due process and equal protection under the Fifth Amendment. *Lugo*, 776 F.2d at 1151-1152.

[11] The court in *Webb* did not expressly rule on the legality of netting under the Title XVI provisions.

Both the Eighth and the Third Circuits recognized that neither the statute nor the legislative history definitively establishes the meaning of the phrase "more or less," which appears in Sections 204(a) and 1631(b)(1). Both acknowledged that by electing not to restrict the period over which the Secretary could determine whether "more or less" than the correct amount has been paid, Congress left to the Secretary's discretion the choice of such period. By applying the appropriate "arbitrary and capricious" standard of scrutiny under *Chevron*, 467 U.S. at 844, the *Lugo* and *Webb* panels concluded that a reasonable construction of the statute did not foreclose the Secretary's choice of method. In rejecting this line of reasoning, the Tenth Circuit's decision is squarely at odds with *Lugo* and *Webb*.

4. The issue in this case is of considerable practical importance, affecting hundreds of thousands of individual claims for adjustment of benefits under two of the largest federal entitlement programs. Between 1981 to 1986, an average of 4.7 million persons annually were affected by some form of payment error in the Title II retirement and survivor's insurance program alone.[12] HHS estimates that it applies the netting procedure to about 300,000 retirement and survivors insurance program beneficiaries each year, and to thousands of others in the remaining programs (such as disability) under both Titles. The elimination of a method that allows a single determination of error for each beneficiary will result in an unwarranted multiplication of labor-intensive procedures, and in the disbursement of benefits in excess of substantive en-

[12] See Social Security: *Payment Accuracy Rates Are Overstated, United States General Accounting Office Report to the Chairmen, U.S. Senate Subcomm. on Labor, Health and Human Services, and Education, Comm. on Appropriations* 19 (Oct. 1987) ("*GAO Report*").

titlements to thousands of beneficiaries every year. This in turn will dramatically increase the cost and difficulty of administering the programs and drain funds that would otherwise go to needy individuals.

The Tenth Circuit rule, which requires calculation of at least two error amounts in all cases where netting produces one, has several practical consequences. First, because the government would receive no credit for past overpayments in computing past underpayments which must be automatically reimbursed, the total amount of money the Secretary must pay out will substantially increase. Those who would otherwise be overpaid after netting will be entitled to reimbursement; those who would be underpaid after netting will be entitled to larger amounts.[13] The additional outlay for 300,000 recipients will be quite substantial, as the average error involved in each case of under-

[13] For example, a beneficiary with $1000 in total underpayments and $500 in total overpayments during a past period would be entitled to reimbursement of $500 after netting. Under a separate accounting system, he would be entitled to reimbursement of $1000 – $500 more than he would have received under the netting regulations. This extra $500 – which previously would have been netted against his underpayment – would now be considered an overpayment that must be recovered separately.

Conversely, a beneficiary found to have a net past overpayment of $500 based on $500 in total past underpayments and $1000 in past overpayments would be entitled to no reimbursement under netting, but would owe the SSA $500. Under the system of separate accounting, the recipient would be entitled to $500 in reimbursement, and the SSA would be forced to attempt to recover a larger amount – $1000 – representing overpayments considered separately. In sum, the disallowance of netting will affect the distribution of funds in three ways: (1) the Secretary must disburse a larger amount of money to all beneficiaries with past mixed errors; (2) the Secretary must attempt to collect overpayments from a new class of beneficiaries not previously considered overpaid; and (3) the amount that the Secretary must attempt to collect from those previously considered overpaid will rise.

payment has been estimated at almost $600. *GAO Report* at 27. Regardless of whether these payments are eventually recovered, SSA will be obliged to set aside large reserves for reimbursement and new administrative costs.

In addition, if netting is foreclosed, the more than 150,000 individuals per year[14] who are currently found to be underpaid (because their total underpayments exceed their total overpayments) will be converted into beneficiaries with outstanding overpayments (because their underpayments will be automatically paid, leaving only overpayments). The multi-step task of processing this new pool of overpaid beneficiaries will demand considerable administrative effort. Even if waiver is not requested, the SSA must notify recipients of their right to request a waiver, answer inquiries and requests for explanations, review and resolve requests for reconsideration as to the fact or amount of overpayment, complete overpayment recovery questionaires, establish payback or future benefit adjustment schedules, monitor or suspend repayment on the basis of pending appeals, and institute collection actions. If a waiver is requested, then in addition the agency must engage in a comprehensive, case-by-case inquiry into the beneficiary's personal circumstances and the reasons for the mistaken payment in order to make decisions as to "fault," "defeat the purpose" and "equity and good conscience."[15] The beneficiary must then be accorded a face-to-face hearing before waiver can be denied and recovery commenced. See *Califano* v. *Yamasaki, supra.*

[14] HHS estimates that over 60% of all payment errors subject to correction (both "net" and "pure") are underpayments, see *GAO Report* at 27, and, by extension, that the group found underpaid after netting represents a majority of "netted" beneficiaries.

[15] The multiple criteria for a finding that a beneficiary is without fault are set forth at 20 C.F.R. 404.507, 510, 510a, 511 (Title II) and 416.552 (Title XVI). The determination involves a sophisticated exercise of administrative judgment based on a host of individualized fac-

These procedures, however burdensome, serve an important and appropriate function in protecting subsistence-level beneficiaries against the loss of future benefits due to past mistakes that are no fault of their own. Surely it is perverse, however, to adopt a rule that in effect requires that beneficiaries be deliberately overpaid, and then subjected to these elaborate procedures before the Secretary may attempt recoupment. Congress never contemplated such a result, and the Secretary's considered regulations do not require it. The decision of the court of appeals in this case, which compels the Secretary to adopt such a procedure, is wrong and warrants further review by this Court.

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tors. See, *e.g.*, 20 C.F.R. 404.507 (the administrator "will consider all pertinent circumstances, including * * * age, intelligence, education, and physical and mental condition"); 20 C.F.R. 416.552 ("Whether the individual is 'without fault' depends on all the pertinent circumstances surrounding the overpayment in the particular case.").

With respect to the "equity and good conscience" exemption, the regulations require the SSA to investigate whether the recipient "because of a notice that such payment would be made or by reason of incorrect payment, relinquished a valuable right * * * or changed [his condition] for the worse." 20 C.F.R. 404.509; see also 20 C.F.R. 404.512, 416.554. A "defeat the purpose" determination, in many instances, necessitates a comprehensive investigation of the beneficiary's financial circumstances to ascertain if recovery would "deprive [an individual] of income required for ordinary and necessary living expenses." 20 C.F.R. 404.508(a) (Title II) and 416.553 (Title XVI).

Finally, Title XVI requires the administrator to decide whether the amount involved is too small to justify recovery by comparing the projected recoupment amount to the "administrative cost of handling" an overpayment case. See 20 C.F.R. 416.555.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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FEBRUARY 1989

APPENDIX A

UNITED STATES COURT OF APPEALS, TENTH CIRCUIT

No. 87-1839

SANDRA EVERHART, THOMAS EVERHART, AND MYRON ZENICK, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED, PLAINTIFFS-APPELLEES

BERLINE WISE AND EMIL S. ZWEIZEN, PLAINTIFFS-INTERVENORS-APPELLEES

v.

OTIS R. BOWEN, M.D., SECRETARY OF HEALTH AND HUMAN SERVICES, AND DORCAS HARDY, COMMISSIONER OF THE SOCIAL SECURITY ADMINISTRATION IN THEIR OFFICIAL CAPACITIES, DEFENDANTS-APPELLANTS

Aug. 12, 1988

Before HOLLOWAY, Chief Judge, TIMBERS* and BALDOCK, Circuit Judges.

BALDOCK, Circuit Judge.

The primary issue presented in this appeal concerns the methodology employed by the Social Security Administration (SSA) to calculate net overpayments and underpay-

* The Honorable William H. Timbers, United States Court of Appeals for the Second Circuit, sitting by designation.

ments of Title II and Title XVI Social Security benefits. Filed as a class action, plaintiffs-appellees' complaint sought declaratory and injunctive relief against defendants-appellants the Secretary of the Department of Health and Human Services (the Secretary) and the Commissioner of the SSA. The plaintiffs challenged the SSA's policy of offsetting underpayments of benefits against overpayments, which they alleged violated their rights under the Social Security Act and denied them due process of law under the fifth amendment to the United States Constitution. The district court entered summary judgment in favor of the plaintiffs, ruling that the netting regulations promulgated by the Secretary are inconsistent with the waiver of recoupment provisions of the Act. The court remanded the named plaintiffs' cases to the SSA and entered a statewide injunction prohibiting the Secretary from applying the regulations to all other Title II and Title XVI beneficiaries.

The Secretary now raises the following issues: 1) whether the netting regulations constitute a reasonable exercise of his authority to implement the Social Security Act; and 2) whether the district court erred in granting statewide injunctive relief when it had not made a determination on the question of class certification. We affirm in part and reverse in part.

As discussed more fully below, both Title II of the Social Security Act, which controls the operation of the Old Age, Survivors and Disability Insurance (OASDI) programs, and Title XVI, which controls the Supplemental Security Income (SSI) program, contain mandatory provisions calling for the Secretary to make payment of amounts due to underpaid recipients and to recover excess amounts received by overpaid recipients. Both titles also contain waiver of recoupment provisions, pursuant to which the Secretary shall not recover from an overpaid

recipient who is without fault when to do so would defeat the purpose of the Act or be against equity and good conscience. The disputed netting regulations establish the methodology by which the SSA determines whether a recipient has been overpaid or underpaid. Pursuant to those regulations, the SSA offsets any overpayments against any underpayments to arrive at a single net amount.

The original plaintiffs all received checks for net underpayments. When Sandra and Thomas Everhart were married in September 1984, Sandra was receiving Title II and SSI benefits, while Thomas was receiving SSI benefits. In early 1985, the SSA determined that from their marriage until that time the Everharts together had incurred a net underpayment of $407. Because there was no net overpayment, the SSA considered the statutory recoupment and waiver of recoupment provisions to be inapplicable.

Myron Zenick began receiving Title II benefits in 1976. In September 1983, the SSA advised Zenick that his disability benefits were being terminated and that he had been overpaid since 1980. Upon Zenick's reapplication for benefits, an ALJ found that he had been disabled since 1982. In March 1985, the SSA notified Zenick that he would be paid $4,402 for net underpayments accruing during the years 1980 to 1985. Again, the SSA deemed the recoupment and waiver of recoupment procedures to be inapplicable.

The intervening plaintiffs both received favorable ALJ waiver decisions which were reversed by the Appeals Council. Berline Wise began receiving Title II disability benefits in 1975. Her benefits were terminated in June 1983; however, she subsequently was awarded old-age benefits as of September 1980. In December 1983, the SSA determined that Wise had received a net overpayment of $14,500 for the years 1976 through 1983. Because she had

been overpaid, the SSA provided Wise an opportunity to seek a waiver of recovery of the net overpayment. Wise instead challenged the netting regulations on the basis that her overpayments and underpayments should be treated separately. The ALJ agreed, but the Appeals Council upheld the net overpayment figure and the application of the waiver procedure to that amount. The Appeals Council also found that Wise was at fault in receiving the overpayment and hence did not qualify for a waiver of recoupment.

Emil Zweizen began receiving Title II old-age benefits in 1977. The SSA later determined that during the years 1977 through 1984 Zweizen had received a net overpayment of $5,107. An ALJ held that the overpayment should be waived, but the Appeals Council considered Zweizen to be at fault.

On December 12, 1986, the original plaintiffs, on behalf of themselves and others similarly situated, filed this action challenging the netting methodology employed by the SSA. The parties stipulated that the netting regulations had been applied to the named plaintiffs and filed cross motions for summary judgment. At a hearing on those motions, the district court ruled from the bench that the regulations contravene the waiver of recoupment provisions of the Social Security Act by denying recipients notice and a hearing on the issue of waiver of recovery of overpayments. Rec. vol. II at 2-5. In so ruling, the court expressly adopted the dissenting opinion in *Lugo v. Schweiker,* 776 F.2d 1143, 1153-56 (3d Cir. 1985) (Gibbons, J., dissenting). Rec. vol. II at 5. Stating that the merits of the case should be appealed "as soon as possible," the court then decided to forego determining whether the class should be certified. *Id.* at 6-7.

In its subsequent order granting the plaintiffs' motion for summary judgment, the court remanded their claims

to the Secretary to recalculate their overpayments and underpayments without utilizing the netting methodology and to accord the plaintiffs their procedural rights under the statute. Rec. vol. I, doc. 6 at 2. The court further ordered that the Secretary be "enjoined from applying the above-referenced [netting] methodology to all other beneficiaries under Title II and/or Title XVI of the Social Security Act in the State of Colorado." *Id.* The statewide injunctive relief was stayed pending this appeal.

I.

The Secretary contends that the regulations employed to determine past payment errors, through the netting of a recipient's entitlements and payments during the entire period during which any payment errors have occurred, constitute a reasonable and permissible construction of the Social Security Act as well as a sound and equitable exercise of his authority to implement the Act.

Resolution of this legal issue requires us to determine whether the netting regulations constitute a valid exercise of the Secretary's authority under the statute. Because the Social Security Act expressly entrusts the Secretary with the responsibility of implementing the Act by regulation, our review of the disputed regulations is limited to determining whether the regulations are arbitrary and capricious or are inconsistent with the statute. *Heckler v. Campbell,* 461 U.S. 458, 466, 103 S.Ct. 1952, 1956, 76 L.Ed.2d 66 (1983); *Hansen v. Heckler,* 783 F.2d 170, 174 (10th Cir.1986).

42 U.S.C. §§ 404(a)(1)[1] and 1383(b)(1)[2] address overpayments and underpayments of Title II and SSI benefits respectively. Both contain language providing that payment shall be made to a beneficiary receiving less than the correct amount and that overpayments shall be recovered from a beneficiary receiving more than the correct amount. The Title II waiver of recoupment provision, § 404(b),[3] qualifies the Secretary's right to recovery or

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[1] 42 U.S.C. § 404(a)(1) provides in pertinent part:

> Whenever the Secretary finds that more or less than the correct amount of payment has been made to any person under this subchapter, proper adjustment or recovery shall be made, under regulations prescribed by the Secretary, as follows:
>
> (A) With respect to payment to a person of more than the correct amount, the Secretary shall decrease any payment under this subchapter to which such overpaid person is entitled, or shall require such overpaid person or his estate to refund the amount in excess of the correct amount . . .
>
> . . . . . .
>
> (B) With respect to payment to a person of less than the correct amount, the Secretary shall make payment of the balance of the amount due such underpaid person, . . .

[2] 42 U.S.C. § 1383(b)(1)(A) provides in pertinent part:

> Whenever the Secretary finds that more or less than the correct amount of benefits has been paid with respect to any individual, proper adjustment or recovery shall, subject to the succeeding provisions of this subsection, be made by appropriate adjustments in future payments to such individual or by recovery from such individual or his eligible spouse . . . or by payment to such individual or his eligible spouse. . . .

[3] 42 U.S.C. § 404(b) provides:

> In any case in which more than the correct amount of payment has been made, there shall be no adjustment of payments to, or recovery by the United States from, any person who is without fault if such adjustment or recovery would defeat the purpose of this subchapter or would be against equity and good conscience.

adjustment under § 404(a)(1)(A) by mandating forgiveness of any repayment of overpaid amounts if the recipient is without fault and recovery would defeat the purpose of the statute or would be against equity and good conscience. The SSI waiver provision, § 1383(b)(1)(B),[4] also directs the forgiveness of overpayments in appropriate situations. Those recipients who do not request a waiver of repayment, or who are denied a waiver, are subject to the recoupment provisions set out in §§ 404(a)(1)(A) and 1383(b)(1)(A).

The disputed netting regulations, promulgated by the Secretary to implement the payment error provisions of the Act, establish a general methodology and accounting period for determining whether, and to what extent, a beneficiary has received a net overpayment or a net underpayment. The SSI netting regulation, 20 C.F.R. § 416.538, provides in pertinent part:

> The amount of an underpayment or overpayment is the difference between the amount paid to a recipient and the amount of payment actually due such recipient for a given period. An overpayment or underpayment period begins with the first month for which there is a difference between the amount paid and the amount actually due for that month. The period ends with the month the initial determination of overpayment or underpayment is made.

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[4] 42 U.S.C. § 1383(b)(1)(B) provides in pertinent part:

> The Secretary (i) shall make such provision as he finds appropriate in the case of payment of more than the correct amount of benefits with respect to an individual with a view to avoiding penalizing such individual or his eligible spouse who was without fault in connection with the overpayment, if adjustment or recovery on account of such overpayment in such case would defeat the purposes of this subchapter, or be against equity and good conscience, . . .

The regulation applicable to Title II payments, 20 C.F.R. § 404.504, is similarly worded at the outset and is administered in a similar manner. *See* SSR 81-19a.

As described by the Secretary, the payment error regulations are known as the netting regulations because they require a determination of a single payment error through the netting of entitlements and payments during a specified past period when erroneous disbursements are found to have occurred. Once a recipient is found to have received overpayments in some months and underpayments in others,a single determination for the entire period is made of either a net overpayment or a net underpayment. If there is a net underpayment, the Secretary pays the recipient the balance due. If there is a net overpayment, recovery in accordance with the statutory recoupment provisions is applicable, subject to the waiver of recoupment procedures.

Contending that the netting regulations are consistent with a permissible and reasonable interpretation of the statute, the Secretary urges this court to follow the decision of the Third Circuit in *Lugo v. Schweiker,* 776 F.2d 1143 (3d Cir.1985). In *Lugo,* which involved a virtually identical challenge to the netting regulations, the majority of the panel stated that "[b]ecause Congress decided not to describe explicitly the method for computing erroneous payments," the court was compelled to defer to the Secretary's interpretation of the Act "so long as it [was] reasonable." *Id.* at 1147. The majority further stated that the Secretary was "entitled to more than mere discretion . . . because both § 404(a) and § 1383(b)(1) expressly authorize her to determine whether "more or less than the correct amount of payment has been made.' " *Id.* Upon analyzing the statute and the regulatory scheme, the majority concluded, consistent with its deferential approach to the Secretary's interpretation of the statute, that the SSA's

decision to net all payment errors and to inform the recipient of the single differential was "reasonable from an administrative point of view, in that SSA can thereby avoid a multitude of confused notices and hearings." *Id.* at 1148.

The dissenting judge disagreed, concluding that "[t]he majority has justified an end run by the Secretary around both the waiver statutes and the Supreme Court's decision in *Califano v. Yamasaki,* [442 U.S. 682, 99 S.Ct. 2545, 61 L.Ed.2d 176 (1979)]." *Id.* at 1156 (Gibbons, J., dissenting). Judge Gibbons reasoned that in light of the plain language of the waiver of recoupment provisions and the Supreme Court's interpretation of § 404(b), the SSA "may not recover overpayments in any manner until an opportunity has been afforded for a waiver hearing," and thus the netting regulations are inconsistent with the waiver provisions and Supreme Court precedent. *Id.* at 1155. The crux of Judge Gibbons' conclusion that the regulations are invalid can be found in his statement that "the netting regulations permit the Secretary to accomplish what the waiver provisions plainly and unequivocally forbid; namely a recovery by the United States of overpayments without a hearing on waiver." *Id.* (footnote omitted).

Recently, the Eighth Circuit likewise rejected a challenge to the Title II netting regulation, essentially agreeing with the Third Circuit's conclusion that the methodology employed by the Secretary to offset overpayments against underpayments is neither arbitrary, capricious nor manifestly contrary to § 404(b). *Webb v. Bowen,* 851 F.2d 190, 192 (8th Cir.1988). We nevertheless deem the reasoning of the dissenting judge in *Lugo* to be more persuasive in light of our similar reading of the mandatory language contained in the waiver provisions of the Social Security Act and of the Supreme Court's interpretation of § 404(b) in *Califano v. Yamasaki,* 442 U.S. 682, 99 S.Ct. 2545, 61 L.Ed.2d 176 (1979). While cognizant that

we are creating a split between circuits, we decline to follow the Third Circuit's decision in *Lugo* and the Eighth Circuit's decision in *Webb* and hold that the Secretary has exceeded his statutory authority in implementing the netting regulations, which are inconsistent with the Act.

Our conclusion that the netting regulations are invalid is premised on the inherent conflicts between the regulations and the recoupment and waiver of recoupment provisions of the statute. Although the disputed regulations treat overpayments and underpayments equally in providing the methodology for computing a single net amount, the statute makes a clear differentiation. "The difference in [the statutory] treatment of overpayments and underpayments is quite plain." *Lugo v. Schweiker,* 776 F.2d at 1154 (Gibbons, J., dissenting). While the provisions relating to underpayments mandate payment without qualification, the recovery of overpayment provisions are qualified by the waiver of recoupment procedures. *See id.* at 1153-54. The Secretary's netting methodology disregards that differential treatment.

More significantly, the Secretary's argument that the regulations constitute a reasonable interpretation of the Social Security Act overlooks the inescapable fact that by offsetting overpayments against underpayments, the SSA has effectively recovered overpayments without complying with the statutorily mandated waiver of recoupment procedures. Consequently, the SSA's employment of the netting methodology results in the deprivation of recipient's rights to notice and a waiver hearing prior to recoupment or adjustment. In *Yamaski,* the Supreme Court interpreted § 404(b) to require a prerecoupment oral hearing. *Califano v. Yamaski,* 442 U.S. at 697, 99 S.Ct. at 2555. The Court noted that, in contrast to other federal statutes authorizing the recovery of federal payments which are "entirely permissive," § 404(b) is "mandatory in form,"

stating that " 'there shall be no' recovery when waiver is proper." *Id.* at 693-94 n. 9, 99 S.Ct. at 2553-54 n. 9. As succinctly stated by Judge Gibbons, "[n]o recovery means no recovery by setoff, and no recovery by suit; no recovery at all." *Lugo v. Schweiker,* 776 F.2d at 1154 (Gibbons, J., dissenting) (footnote omitted).

The Social Security Act grants the Secretary the power to make rules and regulations and to establish procedures which are not inconsistent with the provisions of the Act. *See* 42 U.S.C. §§ 405(a) & 1383(d)(1). The majority in *Lugo* reasoned that because the statute is silent regarding the methodology for computing payment errors, the Secretary is entitled to reasonably interpret that statute to permit the netting regulations. *Lugo v. Schweiker,* 776 F.2d at 1147-48. While it is true that the Act does not specify over what past time period there must be a determination of payment errors, the statute is not silent regarding the differential treatment of overpayments and underpayments and the mandatory waiver of recovery in appropriate instances. A setoff such as that undertaken by the Secretary may be an acceptable practice in a business context; however, business entities are not constrained by mandatory statutory provisions. The netting of overpayments against underpayments also may be, as expressed by the majority in *Lugo,* desirable from an administrative standpoint, but administrative convenience cannot be countenanced when the netting regulations contravene the plain language of the statute.[5]

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[5] The Secretary argues that elimination of the netting methodology would result in a much more complex system for dealing with payment errors. The majority in *Lugo* apparently shared that perception, stating that the "SSA's decision to net *all* errors . . . and then inform the claimant of the single differential is reasonable from an administrative point of view, in that SSA can thereby avoid a multitude of confused notices and hearings." *Lugo v. Schweiker,* 776 F.2d at 1148

The Secretary further argues that elimination of the netting methodology will transform the payment error rules into a device for beneficiaries to obtain windfall payments. That argument is at least somewhat overstated, in that only those overpaid recipients who first request a waiver, and then meet the waiver requirements, are not compelled to repay the excess benefits they have received. Moreover, an overpaid beneficiary who does not have to repay excess benefits is not receiving a windfall, but rather is benefitting from Congress' express provision that recovery must be waived in appropriate situations. *See Lugo v. Schweiker,* 776 F.2d at 1155 (Gibbons, J., dissenting).

To reiterate, the fundamental flaw in the Secretary's position is his disregard of the fact that by netting underpayments against overpayments, he effectively recovers overpayments without complying with the statutory waiver of recoupment provisions. In contravention of those provisions, the netting methodology enables the Secretary to recover benefits from persons who may qualify for a waiver. Viewing the netting regulations in

(emphasis in original). Countering the Secretary's argument, the plaintiffs state that "[n]owhere do [they] assert that monthly notices or monthly waiver hearings are required, as the Secretary suggests." Brief for the Appellees at 19. They contend that "[i]t is certainly within the Secretary's discretion to provide only one notice" of total overpayments and total underpayments, so long as the two amounts are not netted. *Id.*

While we are not called upon to determine the time frame to be utilized in calculating amounts of overpayments or underpayments, the plaintiffs' suggestion appears reasonable and comports with our conclusion that overpayments and underpayments must be treated separately. As we perceive the effect of our holding in light of the procedure suggested by the plaintiffs for calculating total overpayments and total underpayments, the Secretary would be under no greater burden to provide notices and hearings than that already imposed under the statute and the Supreme Court's interpretation of the waiver provisions.

conjunction with the relevant provisions of the Social Security Act, we must conclude that the regulations are inconsistent with the statute.

II.

The Secretary also asserts that the district court erred in granting statewide injunctive relief when it had not made a class certification determination pursuant to Fed.R.Civ.P. 23. Given the present posture of this case, we agree.

After ruling from the bench on the merits of the plaintiffs' challenge to the netting regulations, the court advised the parties that in order to expedite the appeal of its ruling, it would forego a determination on the issue of class certification. Rec. vol. II at 6-7. The court subsequently entered an injunction prohibiting the Secretary from applying the netting regulations to all other Title II and SSA beneficiaries in Colorado. Rec. vol. I, doc. 6 at 2.

In arguing that the district court could not grant what is in effect classwide relief, the Secretary relies primarily on *Baxter v. Palmigiano,* 425 U.S. 308, 96 S.Ct. 1551, 47 L.Ed.2d 810 (1976). In *Baxter,* the Supreme Court noted that in one of the cases the district court had treated the suit as a class action even though the court had not made a class certification within the contemplation of Fed.R.Civ. P. 23. *Id.* at 310-11 n. 1, 96 S.Ct. at 1554-55 n. 1. The Court stated that "[w]ithout such certification and identification of the class, the action is not properly a class action." *Id.* (citing *Indianapolis School Comm'rs v. Jacobs,* 420 U.S. 128, 95 S.Ct. 848, 43 L.Ed.2d 74 (1975)); *see also Zepeda v. INS,* 753 F.2d 719, 727-28 (9th Cir.1983); *Tape Head Co. v. R C A Corp.,* 452 F.2d 816, 819-20 (10th Cir.1971) (per curiam).

The statewide injunction entered by the district court was tantamount to a grant of classwide relief. Citing a

number of cases stating that the determination of whether a suit is to be maintained as a class action is discretionary, *e.g., Baum v. Great Western Cities, Inc., of New Mexico,* 703 F.2d 1197, 1210 (10th Cir.1983), the plaintiffs argue that the court acted within its discretion in entering a statewide injunction without formally certifying a class.[6] Al-

[6] The plaintiffs cite this court's pre-*Baxter* opinion in *Martinez v. Richardson,* 472 F.2d 1121 (10th Cir.1973), for the proposition that a classwide injunction can be entered without a class certification for the purpose of insuring future compliance with the court's decision. As expressed by Judge Doyle,

> [A]s we view it, a class action was not demanded here because the same relief could be afforded without its use and seemingly the [district court] had something of this kind in mind when it provided in paragraph 6 of its findings for further enforcement action if the same should become necessary. Thus the court was thinking of future compliance and this was, of course, the important problem.

Id. at 1127.

The plaintiffs assert that in the instant case the district court was "concerned that in the absence of an injunction the Secretary would continue to employ his invalid netting regulations to deprive potentially hundreds of Colorado residents of their statutory right to waiver." Brief for the Appellees at 30. The record does not reveal either a statement by the district court to that effect or any indication that the Secretary would continue to utilize the netting methodology in the face of the court's ruling that the regulations were invalid. Consequently, we are unable to agree with the plaintiffs' characterization of the statewide injunction as a necessary measure to guarantee future compliance with the district court's ruling. Further, by entering classwide relief without certifying a class, the court has attempted "to determine the rights of persons not before the court" by extending its contempt power to nonparties. *Zepeda v. INS,* 753 F.2d at 727.

We recognize the line of authority indicating that a class certification is unnecessary if all the class members will benefit from an injunction issued on behalf of the named plaintiffs. *See, e.g., Gray v. International Broth. of Elect. Workers,* 73 F.R.D. 638, 640-41 (D.D.C. 1977) and cases cited therein; 7B C. Wright, A. Miller & M. Kane,

though the plaintiffs correctly state the law, the cases they cite simply are inapplicable. At this juncture, there has been no determination on the issue of class certification; indeed, the district court expressly declined to do so. Absent a class certification, the district court should not have treated the suit as a class action by granting statewide injunctive relief, *Baxter v. Palmigiano,* 425 U.S. at 310-11 n. 1, 96 S.Ct. at 1554-55 n. 1, and accordingly should have tailored its injunction "to affect only those persons over [whom] it has power," *Zepeda v. INS,* 753 F.2d at 727. The primary issue in this appeal is the validity of the netting regulations, the expedited resolution of which the dis-

Federal Practice and Procedure § 1785.2 (1986). Broad injunctive relief has been upheld where the nature of the rights sought to be vindicated require that the decree run to the benefit of all persons similarly situated. *See Zepeda v. INS,* 753 F.2d at 733-34 (Norris, J., dissenting); *James v. Ball,* 613 F.2d 180, 186 (9th Cir.1979), *rev'd on other grounds,* 451 U.S. 355, 101 S.Ct. 1811, 68 L.Ed.2d 150 (1981); *Sandford v. R.L. Coleman Realty Co.,* 573 F.2d 173, 178 (4th Cir.1978). In *Davis v. Smith,* 607 F.2d 535, 540 (2d Cir.1978), the Second Circuit agreed with the district court's holding that the prospective effect of its judgment would inure adequately to the benefit of all the proposed class members and that therefore a class certification was not appropriate. As stated by Judge Timbers,

> Where retroactive monetary relief is not at issue and the prospective benefits of declaratory and injunctive relief will benefit all members of a proposed class to such an extent that the certification of a class would not further the implementation of the judgment, a district court may decline certification.

Id.

With the exception of *Zepeda,* which involved the scope of a preliminary injunction, the cases cited above addressed the question of whether the proposed class should be certified; here, the district court made *no* determination on this issue, and entered classwide injunctive relief *prior* to ruling on the certification issue. Given the absence of a ruling on the class certification issue, we deem those cases to be inapplicable here.

trict court desired in deciding to forego ruling on the issue of class certification. The rather unique posture of this case compels us to conclude that the district court acted prematurely in granting classwide injunctive relief.

We affirm the district court's ruling invalidating the netting regulations. We reverse the court's entry of a statewide injunction and remand for further proceedings consistent with this opinion. We offer no opinion either on the propriety of a class certification[7] or on the need for a prospective injunction.

AFFIRMED IN PART and REVERSED IN PART and REMANDED.

[7] While maintaining that the statewide injunction was improper in the absence of a class certification, the Secretary apparently recognizes the possibility that the Fed.R.Civ.P. 23 requirements may be satisfied. 'Although this particular case—or the portions of it involving the validity of the Secretary's netting regulations—may have met the class action prerequisites, the district court made no such findings." Brief for the Appellants at 34.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 85-Z-2590

SANDRA EVERHART, THOMAS EVERHART, AND MYRON ZENICK, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED, PLAINTIFFS

AND BERLINE WISE, EMIL S. ZWEIZEN, PLAINTIFFS-INTERVENORS

– *v.*

OTIS R. BOWEN, M.D., SECRETARY OF HEALTH AND HUMAN SERVICES, AND DORCAS HARDY, COMMISSIONER OF THE SOCIAL SECURITY ADMINISTRATION IN THEIR OFFICIAL CAPACITIES, DEFENDANTS

[Filed Apr. 14, 1987]

ORDER

This matter was before the Court on December 8, 1986, on cross-motions for summary judgment. The issue before the Court is whether the methodology which the Secretary of the Department of Health and Human Services uses to calculate overpayments and underpayments to beneficiaries under Title II and Title XVI of the Social Security Act is valid. That methodology is set forth at 20 C.F.R.

sec. 416.538 and S.S.R. 81-19A and was applied to the named plaintiffs in this case.

The Court made findings of fact and conclusions of law which are hereby incorporated by reference as if fully set forth. There is no genuine issue as to any material fact, and plaintiffs are entitled to judgment as a matter of law. Accordingly, it is

ORDERED that defendants' Motion for Summary Judgment is denied and plaintiffs' Motion for Summary Judgment is granted. It is

FURTHER ORDERED that the claims of the named plaintiffs, Sandra Everhart, Thomas Everhart, Myron Zenick, and Berline Wise, are remanded to the Secretary of the Department of Health and Human Services for calculation of their overpayment(s) and/or underpayment(s), without application of the above-referenced methodology. Plaintiffs will be accorded whatever procedural rights they would otherwise be entitled to under the Social Security Act including notice and opportunity to request waiver of any overpayment. It is

FURTHER ORDERED that defendants are hereby enjoined from applying the above-reference methodology to all other beneficiaries under Title II and/or Title XVI of the Social Security Act in the State of Colorado. It is

FURTHER ORDERED that defendants will promptly notify the appropriate individuals within the Social Security Administration of this Order and the need to promptly comply with this Order. It is

FURTHER ORDERED that defendants will provide plaintiffs' counsel with copies of any notices required above and any policy statements or instructions implementing this Order. It is

FURTHER ORDERED that the Motion to Intervene on Behalf of Plaintiff-Intervenor Emil S. Zwiezen is granted.

DATED at Denver, Colorado, this 14th day of April 1987, nunc pro tunc December 8, 1986.

BY THE COURT:

/s/ Zita L. Weinshienk

ZITA L. WEINSHIENK, Judge
United States District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 85-Z-2590

SANDRA EVERHART, ET AL., PLAINTIFFS

vs.

OTIS R. BOWEN, ET AL., DEFENDANTS

REPORTER'S TRANSCRIPT
(Hearing on Motion for Summary Judgment: Bench Ruling)

Proceedings before the HONORABLE ZITA L. WEINSHIENK, Judge, United States District Court for the District of Colorado, commencing at 9:15 a.m., on the 8th day of December, 1986, in Courtroom C-204, United States Courthouse, Denver, Colorado.

APPEARANCES

LINDA J. OLSON, Attorney at Law, Legal Aid Society of Metropolitan Denver, 770 Grant Street, Suite 105, Denver, Colorado, 80203, appearing for the plaintiffs.

ROBERT N. MILLER, United States Attorney, by JAMES R. CAGE, Assistant U.S. Attorney, 1961 Stout Street, 12th Floor, Denver, Colorado, 80294, appearing for the defendants.

(The following proceedings were had and entered of record after the Court heard the arguments of counsel:)

RULING

THE COURT: Let me indicate that I have looked at the statute—statutes in question, 42 United States Code section 404(a) and (b) more specifically. I have looked at *Califano v. Yamasaki.* The cite on that is 442 U.S. 682. It's a 1979 Supreme Court decision. I've looked at the majority and minority decisions in *Lugo v. Schweiker,* which is a Third Circuit decision. That's cited at 776 F.2d 1143, a 1985 decision.

I find myself agreeing with the logic and the reasoning of Judge Gibson's dissent in that, rather than with the two-judge majority. Judge Gibson is rather thorough in his analysis; and if I were to write an opinion in this case, I might simply plagiarize his. But let me just indicate from his opinion on page 1154, in footnote 4:

"*Yamasaki,* however, declared that in any case where an overpayment has been made, there shall be no adjustment of payments to or recovery from any person who requests waiver under 404(b) absent notice to the persons affected and an informal hearing on the issue of fault and on the issues of whether recovery would defeat the purposes of the subchapter or be against equity and good conscience."

He goes on to indicate that he is satisfied, as I am, that *Yamasaki* interpreted 42 U.S. Code 404(b) as requiring the Government to give beneficiaries notice and a hearing on the waiver question before seeking to recover unpaid benefits from them. He then goes on to discuss the regulation which is at issue here and on page 1155 indicates that "The key to netting regulations is the Secretary's completely artificial definition of the period for calculation of overpayments and underpayments. The Secretary has chosen to disregard the fact that the overpayment provisions refer to monthly benefits. Instead, the Secretary has devised an entirely different measure—entirely different period of measurement."

And on the second column of page 1155, he points out that the effect, he says, "of the regulation is that the period for calculating overpayments or underpayments is completely open-ended. It can involve recapture of overpayments made even a quarter century ago." That sounds a little extreme. "More significant for this appeal, however, is the fact that the netting regulations permit the Secretary to accomplish what the waiver provisions plainly and unequivocally forbid; namely, a recovery by the United States of overpayments without a hearing on waiver." And he goes into more detail in a footnote concerning that thought.

And then Judge Gibson concludes that "The majority has justified an end run by the Secretary around both the waiver statutes and the Supreme Court's decision in *Califano v. Yamasaki,* because the District Court opinion," and that was the District Court in the Lugo case below, "recognizes that the netting regulation is inconsistent with the waiver statutes and the Supreme Court precedent. I would affirm."

Well, this court, although it looks to Third Circuit and other circuit decisions as precedent where we have no Tenth Circuit opinion, doesn't blindly follow it where this court believes that the better rule would be that expressed in the dissent and that the Tenth Circuit, if faced with this issue, would follow the dissenting opinion, rather than the majority opinion. And in this case, I have great difficulty with the logic of the majority opinion; and it seems to me logically one can follow the reasoning of the dissenting opinion of Judge Gibson. Sure, regs are entitled to all sorts of consideration, unless the regulations are contrary to the statutes or contrary to Supreme Court decision.

And in this case, when you look at the regs in light of what the statute says and in light of the Supreme Court decision, *Yamasaki,* then have I [*sic*] to agree with Judge

Gibson that the regulations do, as he put it, make an end run against what is required by the statute.

I think where the Third Circuit majority opinion goes awry is somehow saying that 24(a) can be allowed or that the regulation involving 24(a) can do away with somehow the overpayment provision of 404(b); and these have to be looked at separately. 404(a) deals with how the Secretary arrives at the numbers concerning entitlements. There is no hearing under 404(a). But under 404(b), there has to be a hearing because the waiver requires weighing of the evidence, hearing about fault, and so forth.

This is not a 404(a) case. This as 404(b) case; and that hearing must be held, just as I think the court in *Lugo v. Schweiker* errs and doesn't really consider that as a 404(b) case.

In any case, the Court would feel that the reasoning and the justification set forth in Judge Gibbons' dissenting opinion in *Lugo v. Schweiker* is the correct interpretation. I'll incorporate that dissenting opinion by reference. I think this is going to have to be decided by the Tenth Circuit, and the sooner it decides it, the better, certainly. Ultimately, this is going to have to be decided, I'm sure, by the United States Supreme Court.

But at this time, the Court would order that—and maybe we can have the parties get together on the precise wording of the order, but the Court would order that the defendants be enjoined from applying the automatic adjustment regulation 416.538 to evade the waiver determination hearing requirement of 404(b) and will be required to give notice and have a prompt hearing as far as the plaintiff—I guess we have two plaintiffs, because we permitted an intervention—the plaintiffs are concerned.

I would ask the attorneys to see if you can get together as quickly as possible on a final order, because I think this case really should go up to the Court of Appeals as soon as

possible; and I hate to postpone this for a year with the various things that have to happen with a class hearing.

Ms. Olson, Mr. Cage, is there any way that there can be a final order on this case as soon as possible, so that the case can be appealed and decided by the Tenth Circuit? Do you think you could talk together about that?

MS. OLSON: I think so, yes.

MR. CAGE: Your Honor, I think it would be delayed if we went ahead with the class proceedings. I mean we could agree on a final order in this case, if we don't have to deal with the class. If we have to go through the class, then I think it's going it [*sic*] take briefing and the whole deal.

THE COURT: Well, I'm just trying to remember in some of the other cases. We avoided a class certification because I determined that I could make some very broad injunctive rules prospectively. Those were different issues, but they dealt with Social Security. I don't know whether your office handled some of those cases or not.

MS. OLSON: Yes, well, we have had experience in dealing with the Secretary in treating the case like a class action and not calling it a class action, which might be something we could work out, where they would send notices and would, you know, publish a change in the regulations so that class certification doesn't need to be instituted.

THE COURT: If my memory serves me right, I was just reversed not too long ago on a Social Security case which involved deduction of unemployment benefits from Social Security; and that got up pretty fast, I think. But I think it makes sense to try to get this up to the Court of Appeals as fast as possible, because either side losing this is going to take the appeal, obviously.

My decision is based on the very persuasive dissent of Judge Gibbons – not Gibson but Gibbons. I think I said "Gibson," mistakenly; and it is based on his reasoning as applied to this case, because I can't see any differences,

which I think should determine the Tenth Circuit determination.

So why don't you get your heads together and see if there is some way to have a final order here so that this case can go up on appeal as soon as possible. Would you advise me through my law clerk, Lili Lehrburger?

MS. OLSON: Yes.

THE COURT: Thank you. We're not going to recess. We are going to call up the next case.

(Thereupon, the hearing concluded at 10:25 a.m.)

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 85-Z-2590

SANDRA EVERHART, ET AL., PLAINTIFFS

v.

OTIS R. BOWEN, M.D., SECRETARY OF HEALTH AND HUMAN SERVICES, AND DORCAS HARDY, COMMISSIONER OF THE SOCIAL SECURITY ADMINISTRATION IN THEIR OFFICIAL CAPACITIES, DEFENDANTS

[Filed Jan. 10, 1989]

ORDER CERTIFYING CLASS

This matter was before the Court on December 20, 1988, for oral argument on Plaintiffs' Motion For Class Certification. The Court heard the arguments and statements of counsel and made oral conclusions of law which are incorporated hereby by reference as if fully set forth. Accordingly, it is

ORDERED that Plaintiffs' Motion For Class Certification is granted. It is

FURTHER ORDERED that the following class is certified in this case:

All persons residing in the Tenth Federal Judicial Circuit, consisting of Colorado, Utah, New Mexico, Oklahoma, Kansas and Wyoming:

(1) who are now or have been recipients of Supplemental Security Income (SSI) benefits and/or Old Age, Survivors and Disability Insurance (OASDI) benefits; and

(2) who have received erroneous payment(s) consisting of both more than the correct amount due for a month or months (referred to as an "excessive disbursement" or "overpayment") and less than the correct amount due for a month or months (referred to as a "deficient disbursement" or "underpayment"); and

(3) who have been or will be denied an opportunity to request waiver of the entire excessive disbursement or overpayment, as authorized by 42 U.S.C. § 404(b) and/or 42 U.S.C. § 1383(b)(1), due to the application of the Secretary's "netting" policy as states [*sic*] in 20 C.F.R. § 404.504 and/or 20 C.F.R. § 416.538; and

(4) whose erroneous payments were recovered pursuant to the Secretary's netting regulations on or after December 8, 1986; and

(5) who have made or will make a claim to the Secretary not to have the netting policy applied in their cases.

The Class shall also include those recipients whose requests for judicial review of the netting policy were pending in this District Court on or after December 8, 1986. It is

FURTHER ORDERED that defendants shall attempt to identify all class members by February 20, 1989. It is

FURTHER ORDERED that the Court shall retain jurisdiction over this case.

DATED at Denver, Colorado, this 4th day of January, 1989.

BY THE COURT:

/s/ Zita L. Weinshienk

ZITA L. WEINSHIENK, Judge
United States District Court

APPENDIX D

Social Security Act, §§ 204(a)(1), 204(b), 42 U.S.C. 404(a)(1), 404(b):

§ 404 Overpayments and underpayments

(a) Procedure for adjustment or recovery

(1) Whenever the Secretary finds that more or less than the correct amount of payment has been made to any person under this subchapter, proper adjustment or recovery shall be made, under regulations prescribed by the Secretary, as follows:

(A) With respect to payment to a person of more than the correct amount, the Secretary shall decrease any payment under this subchapter to which such overpaid person is entitled, or shall require such overpaid person or his estate to refund the amount in excess of the correct amount, or shall decrease any payment under this subchapter payable to his estate or to any other person on the basis of the wages and self-employment income which were the basis of the payments to such overpaid person, or shall apply any combination of the foregoing. A payment made under this subchapter on the basis of an erreoneous report of death by the Department of Defense of an individual in the line of duty while he is a member of the uniformed services (as defined in section 410(m) of this title) on active duty (as defined in section 410(*l*) of this title) shall not be considered an incorrect payment for any month prior to the month such Department notifies the Secretary that such individual is alive.

(B) With respect to payment to a person of less than the correct amount, the Secretary shall make payment of the balance of the amount due such underpaid person, or, if such person dies before payments are completed or before negotiating one or more checks representing correct payments, disposition of the amount due shall be made in accordance with subsection (d) of this section.

(b) No recovery from persons without fault

In any case in which more than the correct amount of payment has been made, there shall be no adjustment of payments to, or recovery by the United States from, any person who is without fault if such adjustment or recovery would defeat the purpose of this subchapter or would be against equity and good conscience.

Social Security Act, § 1631(b)(1), 42 U.S.C. § 1383(b)(1):

(b) Overpayments and underpayments; adjustment, recovery, or payment of amounts by Secretary

(1)(A) Whenever the Secretary finds that more or less than the correct amount of benefits has been paid with respect to any individual, proper adjustment or recovery shall, subject to the succeeding provisions of this subsection, be made by appropriate adjustments in future payments to such individual or by recovery from such individual or his eligible spouse (or from the estate of either) or by payment to such individual or his eligible spouse, or, if such individual is deceased, by payment –

(i) to any surviving spouse of such individual, whether or not the individual's eligible spouse, if (within the meaning of the first sentence of section 402(i) of this title) such surviving husband or wife was living in the same household with the individual at the time of his death or within the 6 months immediately preceding the month of such death, or

(ii) if such individual was a disabled or blind child who was living with his parent or parents at the time

of his death or within the 6 months immediately preceding the month of such death, to such parent or parents.

(B) The Secretary (i) shall make such provision as he finds appropriate in the case of payment of more than the correct amount of benefits with respect to an individual with a view to avoiding penalizing such individual or his eligible spouse who was without fault in connection with the overpayment, if adjustment or recovery on account of such overpayment in such case would defeat the purposes of this subchapter, or be against equity and good conscience, or (because of the small amount involved) impede efficient or effective administration of this subchapter, and (ii) shall in any event make the adjustment or recovery (in the case of payment of more than the correct amount of benefits), in the case of an individual or eligible spouse receiving benefit payments under this subchapter (including supplementary payments of the type described in section 1382e(a) of this title and payments pursuant to an agreement entered into under section 212(a) of Public Law 93-66), in amounts which in the aggregate do not exceed (for any month) the lesser of (I) the amount of his or their benefit under this subchapter for that month or (II) an amount equal to 10 percent of his or their income for that month (including such benefit but excluding any other income excluded pursuant to section 1382a(b) of this title), unless fraud, willful misrepresentation, or concealment of material information was involved on the part of the individual or spouse in connection with the overpayment, or unless the individual requests that such adjustment or recovery be made at a higher or lower rate and the Secretary determines that adjustment or recovery at such rate is justified and appropriate. The availability (in the case of an individual who has been paid more than the correct amount of benefits) of procedures for adjustment or re-

covery at a limited rate under clause (ii) of the preceding sentence shall not, in and of itself, prevent or restrict the provision (in such case) of more substantial relief under clause (i) of such sentence.

20 C.F.R. 404.504:

Relation to provisions for reductions and increases.

The amount of an overpayment or underpayment is the difference between the amount paid to the beneficiary and the amount of the payment to which the beneficiary was actually entitled. Such payment, for example, would be equal to the difference between the amount of a benefit in fact paid to the beneficiary and the amount of such benefit as reduced under section 202(j)(1), 202(k)(3), 203(a), or 224(a), or as increased under section 202(d)(2), 202(m), or 215(f) and (g). In effecting an adjustment with respect to an overpayment, no amount can be considered as having been withheld from a particular benefit which is in excess of the amount of such benefit as so decreased.

20 C.F.R. 416.538:

Amount of underpayment or overpayment.

The amount of an underpayment or overpayment is the difference between the amount paid to a recipient and the amount of payment actually due such recipient for a given period. An overpayment or underpayment period begins with the first month for which there is a difference between the amount paid and the amount actually due for that month. The period ends with the month the initial determination of overpayment or underpayment is made. With respect to the period established, there can be no underpayment to a recipient or his eligible spouse if more than the correct amount payable under title XVI of the

Social Security Act has been paid (whether or not adjustment or recovery of any overpayment for that period has been waived under the provisions of §§ 416.550 through 416.555) a subsequent initial determination of overpayment will require no change with respect to a prior determination of overpayment or to the period relating to such determination to the extent that the basis of the prior overpayment remains the same. Where an apparent overpayment has been detected but determination of the overpayment has not been made (see § 416.558(a)), a determination and payment of an underpayment which is otherwise due cannot be delayed unless a determination with respect to the apparent overpayment can be made before the close of the month following the month in which the underpaid amount was discovered. Further, any underpayment amount apparently due the surviving eligible spouse on account of a deceased recipient is reduced by the amount of any outstanding penalty imposed against the benefits payable to such deceased recipient under section 1631(e) of the Act (see § 416.537(b)(2)).

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OPPOSITION

BRIEF

(8)

FILED
APR 25 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1323

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

LOUIS W. SULLIVAN, M.D., SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL.,

Petitioners,

v.

SANDRA EVERHART, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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ATTORNEYS FOR RESPONDENTS

PARTIES TO THE PROCEEDINGS

The respondents adopt and incorporate the petitioners' list of the parties except that Louis W. Sullivan, M.D., the newly-appointed Secretary of Health and Human Services, has been substituted for Don H. Newman.

QUESTION PRESENTED

Whether the Tenth Circuit Court of Appeals correctly determined that Social Security regulations requiring the recovery of overpayments by the netting of underpayments without written notice of pre-recoupment waiver rights violate the Social Security Act.

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No. 88-1323

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

LOUIS W. SULLIVAN, M.D.,[1] SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL.,

Petitioners,

v.

SANDRA EVERHART, ET AL.,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION

The respondents, Sandra and Thomas Everhart, Myron Zenick, Berline Wise, and Emil Zwiezen, representing a Tenth Circuit-wide class of elderly and disabled Title II and Title XVI beneficiaries, respectfully request that this Court deny the petition for writ of certiorari to review the Tenth Circuit's opinion in this case. That opinion is reported at 853 F.2d 1532. (Petitioners' Appendix 1a).

STATEMENT OF THE CASE

This case concerns the validity of Social Security regulations which authorize the recoupment of overpayments from underpayments through "netting"[2] without affording beneficiaries

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[1] Louis W. Sullivan, M.D., succeeded Don M. Newman as Secretary of Health and Human Services on March 1, 1989. Pursuant to Sup. Ct. R. 40.3, Louis W. Sullivan, M.D., should be substituted, for Don M. Newman.

[2] The Secretary's challenged regulations, under both Title II and Title XVI, shall be referred to as the "netting" regulations. See 20 C.F.R. §§404.504, 416.538.

written notice of pre-recoupment waiver rights. As a result of these regulations, blameless impoverished individuals are required to repay overpayments without an opportunity to seek waiver under 42 U.S.C. §404(b). See Califano v. Yamasaki, 442 U.S. 682 (1979).

1. Title II of the Social Security Act established the Old Age, Survivors and Disability Insurance (OASDI) program which pays monthly benefits to insured workers, their spouses, and their children when the workers are disabled, retired or deceased. 42 U.S.C. §401 et seq. Title XVI established the Supplemental Security Income program (SSI), which pays monthly benefits to aged, blind and disabled poor people. 42 U.S.C. §1381 et seq.

The statutory provisions which govern the issues of this case are found in Sections 204 and 1631(b) of the Social Security Act, 42 U.S.C. §§404 and 1383(b)(1).[3] The waiver statute, 42 U.S.C. §404(b), limits the Secretary's right to adjust or recover any overpayment described in 42 U.S.C. §404(a)(1)(A).[4] It mandates forgiveness of overpayments if certain conditions are met. If a beneficiary can establish that he is without fault and repayment would defeat the beneficent purpose of the Act, the Secretary must waive recovery of the overpayment. Beneficiaries who do not request waiver or who are denied waiver[5] are subject to recoupment procedures. 42 U.S.C. §404(a)(1)(A).[6]

All of the named respondents have received both overpayments and underpayments.[7] None of the named respondents received notice of waiver rights prior to the Secretary's recoupment or adjustment of their underpayments. The respondents allege that they have been deprived of their right to seek pre-recoupment waiver as a result of the Secretary's netting regulations.

2. The five named respondents are all severely disabled or elderly Social Security or SSI beneficiaries. Respondents Sandra and Thomas Everhart and Myron Zenick suffer from mental impairments. Intervenors Berline Wise and Emil Zwiezen are elderly. Because of changing circumstances which affected the entitlement and amount of their benefits, the five respondents received both overpayments of benefits during certain periods and underpayments of benefits during other periods. All were subjected to the Secretary's netting regulations which offset their underpayments against their overpayments without pre-

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[3] The relevant statutes and regulations, have been set out in their entirety in Pet. App. 28a-32a.

[4] 42 U.S.C. §404(b) provides:

> In any case in which more than the correct amount of payment has been made, there shall be no adjustment of payments to, or recovery by the United States, from any person who is without fault if such adjustment or recovery would defeat the purpose of this subchapter or would be against equity and good conscience.

The SSI waiver provision similarly directs the Secretary to:

> [avoid] penalizing such individual...who was without fault...if adjustment or recovery...would defeat the purposes of this subchapter, or be against equity and good conscience...or impede efficient... administration.

Social Security Act §1631(b)(1), 42 U.S.C. §1383(b)(1).

[5] The waiver regulations under Title II appear at 20 C.F.R. §§404.502a, 404.506 through 404.512. The Title XVI waiver regulations are set out at 20 C.F.R. §§416.550 through 416.555.

[6] See also 20 C.F.R. §§404.502, 416.560, 416.570.

[7] An overpayment is defined in the SSI regulations as "payment of more than the amount due." 20 C.F.R. §416.537(a). An underpayment is defined as both nonpayment, where payment was due and not made, and payment of less than the amount due. 20 C.F.R. §416.536. For the Title II regulations, see 20 C.F.R. §404.501.

recoupment wri… …heir right to request waiver of the overpayment…

a. Beca… …riage on September 22, 1984 and their changin… …s. Sandra Everhart received an underpayment o… …overpayment of $19.33, while her husband, Thom… …$221.50 and overpaid $169.80 in SSI benefits. …omplaint, para. 22; Defendants' Answer, para. … …yments and overpayments occurred between August … …1984. Id. Mr. and Mrs. Everhart did not rece… …from the Secretary that netting had been appli… …ntil after the overpayments were re…overed thr… …App. 3a). Although the amounts of their all… …re small, they were significant when compared … …S combined monthly SSI grant-$488.00.

b. Rec… …d $5,357.20 recouped as the result of net… …a. 42; Answer para. 1). A …itle II bene… …manic depression, Mr. Zenick …as notified … …in September 1983 that his disability ha… …arch 1980 and that he had been overpaid $1… …received after March 1980.[8] (Complaint, p… …ra. 23). After this termination decision, M… …tely reapplied for disability benefits and … …administrative law judge (ALJ) issued a dec… …nick disabled since March 1982. (Complaint, p… …ra. 1). This decision resulted in an underpa… …verpayment resulted from the former policy of "retroactive …s. That policy was abandoned in …ad protests across the country …th the promulgation of medical …cretary formally abandoned this …g)(2).

[8] That application … cessation" of … 1985 as the … concerning it… improvement r… policy. See …

Although Mr. Zenick was owed an underpayment of retroactive benefits from the date of his wrongful termination in September 1983 through January 1985 and continuing, the Secretary applied the netting policy to substantially reduce the amount of the underpayment owed. On March 13, 1985, Mr. Zenick was sent a notice that the retroactive benefits due him would be reduced by $5,357.20 because of the remaining overpayment for the period from April 1980 through March 1982.[9] (Complaint, para. 42; Answer, para. 1). Mr. Zenick was not given an opportunity to request waiver of this overpayment before the Secretary netted his benefits. (Pet. App. 3a). According to Milt Yoelin, Mr. Zenick's uncle, Mr. Zenick suffered "extreme emotional distress" as a result of the application of the netting regulations, and this caused him to "lose faith...in his ability to be financially independent and secure." See Affidavit of Milt Yoelin, June 26, 1987, Exhibit "B" to Plaintiffs' Brief, June 26, 1987.

c. Intervenor Emil Zwiezen, now 76, received a notice from the Secretary that he had been overpaid approximately $9,483 in retirement benefits because of underestimated earnings. (Zwiezen Complaint in Intervention, para. 15; Zwiezen Answer, para. 9). He was underpaid $4,376, however, because of unpaid increases in his monthly benefit amount. Id. The Secretary netted these two amounts and determined that Mr. Zwiezen had received a net overpayment of $5,107. (Pet. App. 4a).

[9] Although the Secretary acknowledged that he may have applied the netting regulations improperly in Mr. Zenick's case (Brief for the Appellants, September 1, 1987, p. 9, n.9), the Secretary has taken no steps to correct this possible error.

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Although an ALJ ruled that this overpayment should be waived, the Appeals Council reversed that decision and considered Mr. Zwiezen to be at fault.[10] (Zwiezen Complaint, para. 14; Zwiezen Answer, para. 7). Because of his failure to receive his $4,376 underpayment, Mr. Zwiezen suffered severe emotional and financial distress. See Affidavit of Emil Zwiezen, June 26, 1987, Exhibit "A" to Plaintiffs' Brief in Response, supra. According to Mr. Zwiezen, he and his wife were totally dependent on his monthly Social Security check of $911. Because he did not receive his needed underpayment, he was unable to pay his bills--the water department sent him a shut-off notice, he fell behind in his house payments, and owed his druggist $300 for heart medication. Id.

d. Intervenor Berline Wise was subjected to a "netting period" of seven years.[11] (Pet. App. 3a). In December 1983, the Secretary determined that intervenor Wise had received a net overpayment of $14,984 for the years 1976 through 1983. This resulted from an alleged overpayment of $25,171 and an underpayment of $10,187. (Wise Complaint in Intervention, para. 20, 25; Wise Answer, para. 1). Although the Secretary afforded Mrs. Wise an opportunity to seek waiver of recovery of only the net overpayment, Mrs. Wise challenged the netting regulations and sought waiver of the entire overpayment. The ALJ agreed, but the Appeals Council "upheld the net overpayment figure and the application of the waiver procedure to that amount." (Pet. App. 4a). The Appeals Council also found that Mrs. Wise was at fault

[10] This determination was later reversed by the District Court on other grounds. Everhart v. Bowen, 694 F. Supp. 1518 (D. Colo. 1987).

[11] The netting period begins with the first month of incorrect payment and ends with the month of the Secretary's initial determination that there has been both an overpayment and an underpayment. 20 C.F.R. §416.538. Social Security Ruling (SSR) 81-19a (1981) provides that this period also applies to netting under Title II, 20 C.F.R. §404.504.

in receiving the overpayment and did not qualify for a waiver of recoupment.[12] (Wise Complaint, para. 27; Wise Answer, para. 1).

REASONS WHY THE PETITION SHOULD BE DENIED

The Tenth Circuit is the first appellate court to analyze fully and properly the netting regulations in conjunction with the waiver and overpayment statutes. The conflicting opinions of the Third[13] and Eighth[14] Circuits misapprehended both the plain language of the Social Security Act and this Court's interpretation of the waiver provisions in Califano v. Yamasaki, 442 U.S. 682 (1979).

Furthermore, the Secretary's claim of administrative burden if the Tenth Circuit rule is implemented is entirely speculative. Consequently, the respondents respectfully urge this Court to summarily affirm the Tenth Circuit's decision. United States v. Lane Motor Co., 344 U.S. 630 (1953). In the alternative, certiorari should be denied.

I. The court below fully considered and correctly decided the issues presented in this case.

In the well-reasoned Tenth Circuit opinion, the court properly reviewed the netting regulations in accordance with Heckler v. Campbell, 461 U.S. 458 (1983), by limiting its review to an analysis of whether the regulations are arbitrary and capricious or inconsistent with the statute. (Pet. App. 5a). The appellate court found that the plain and unequivocal language of the waiver statute forbids recoupment of overpaid funds

[12] This determination was later reversed by the District Court on other grounds. Everhart v. Bowen, 694 F. Supp. 1518 (D. Colo. 1987).

[13] Lugo v. Schweiker, 776 F.2d 1143 (3d Cir. 1985).

[14] Webb v. Bowen, 851 F.2d 190 (8th Cir. 1988).

through netting without an opportunity to request waiver. (Pet. App. 11a). The waiver statute mandates that "there shall be no recovery..." from individuals without fault when such recovery would defeat the purposes of the Act. 42 U.S.C. §404(b) (emphasis added) (Id. at 11a).[15]

Following the dissenting opinion of Judge Gibbons in Lugo, the Tenth Circuit found "[n]o recovery means no recovery by setoff, and no recovery by suit; no recovery at all." (Pet. App. 11a, citing Lugo v. Schweiker, 776 F.2d 1143,1154 (Gibbons, J. dissenting)).

The appellate court gave significant weight to the fact that the 1968 Amendments to the Social Security Act mandated separate and distinct treatment for overpayments and underpayments. Underpayments were required to be paid out without qualification. 42 U.S.C. §404(a)(1)(B). Overpayments, on the other hand, could only be recouped in accordance with the waiver procedures. "The Secretary's netting methodology disregards that differential treatment," the Tenth Circuit found. (Pet. App. 10a).

The Secretary's regulations require recoupment from blameless individuals in netted cases. The appellate court was correct in holding that this practice authorized an impermissible "end-run" around the waiver statute and Yamasaki. 442 U.S. 682 (1979). (Pet. App. 9a, quoting from Judge Gibbons' dissenting opinion in Lugo, at 1156).

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[15] The legislative history of the waiver provision underscores the intent of Congress to totally prohibit any forced repayment of waivable overpayments:

> Section 204(b) waives any right of the United States to recovery by legal action or otherwise in any case of incorrect payment to an individual if adjustment or recovery would defeat the purpose of this title or would be against equity and good conscience.

S. Rep. No. 734, 76th Cong., 1st Sess. 51 (1939); H.R. Rep. No. 728, 76th Cong., 1st Sess. 42 (1939) [emphasis added].

The Tenth Circuit rejected the Secretary's claim that netting was merely a bookkeeping mechanism for determining the amount of overpayments authorized by 42 U.S.C. §404(a). The appellate court observed that while such offsets may be appropriate in a business context, businesses are not governed by similar mandatory statutory provisions. (Pet. App. 11a).

The Tenth Circuit also addressed the Secretary's unfounded claim that without netting, undeserving claimants would receive "windfalls" and that he would be forced to adopt a more complex system for dealing with payment errors. The court held the "windfall" claim to be "somewhat overstated" in that only those beneficiaries who meet the strict statutory and regulatory requirements for waiver are spared recovery of overpayment, and this relief from repayment is exactly what Congress intended. (Pet. App. 12a).

The court further noted that its order only meant that overpayments and underpayments must be treated separately, and that the Secretary could either issue separate notices or one notice. Id. The court found that its decision put no greater burden on the Secretary than that already imposed by statute. (Id. at 11a-12a, n.5). In any event, the court concluded:

> ...administrative convenience cannot be countenanced when the netting regulations contravene the plain language of the statute.

(Pet. App. 11a) (footnote omitted).

Unlike the Tenth Circuit's opinion, both the Lugo and Webb opinions misapprehended the Secretary's unsupported allegations of the "confusion" that would ensue if netting is eliminated. Both courts believed that the only alternative to netting would be a multitude of notices and hearings for every individual payment error. See Lugo, 776 F.2d at 1148, cited in Webb, 851 F.2d at 192. However, the waiver statute does not require this

result. The statute mandates only that when an overpayment is discovered, waiver rights must be afforded prior to recoupment. There is no requirement for monthly notices or monthly waiver hearings, although those would be permissible under the statute. Equally permissible would be quarterly or annual notices of overpayments together with notices of waiver rights.[16] Under the statute, the mechanism for notifying beneficiaries of payment errors should be left to the Secretary.

However, the Secretary is not free to disregard the mandatory waiver statute which by its express terms applies to all overpayments "in any case...[to] any person who is without fault...." 42 U.S.C. §404(b). The netting regulations in this case are clearly distinguishable from the Environmental Protection Agency regulations in Chevron U.S.A. Inc. v. NRDC, Inc., 467 U.S. 837 (1984), which merely filled a gap in the statutes left by Congress. In this case there could hardly be a clearer expression of Congressional intent that recovery of all overpayments meeting statutory waiver criteria be waived. The Secretary has no discretion to circumvent Congressional intent.

In sum, the Tenth Circuit analysis of the conflict between the statutes and the netting regulations is the most compelling and carefully reasoned of the three circuit court opinions on this issue, and further review by this Court is unnecessary.

II. The Secretary mischaracterizes this Court's decision in Yamasaki as supporting the validity of the netting regulations.

Ironically, the Secretary attempts to characterize this Court's decision in Yamasaki, which unequivocally upheld the right to pre-recoupment waiver procedures, as support for the

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[16] Until 1985, the Title XVI regulation, 20 C.F.R. §416.538, required netting on a quarterly basis. See 50 Fed. Reg. 48,573.

validity of the netting regulations. To embrace this reasoning, one must agree with the Secretary that "netting" is not a "recovery," and that netting is merely a mathematical computation exempt from 42 U.S.C. §404(b). Neither of these conclusions is plausible under the statutory scheme or Yamasaki.

When a disabled Social Security recipient such as Myron Zenick loses the right to request waiver of a $5,357.20 overpayment merely because it was netted from an underpayment he was owed, there can be no question that the Secretary recovered the overpayment without affording Mr. Zenick notice of his right to waiver. Under Yamasaki such recoupment is not a "proper" recovery:

> On its face, §204 requires that the Secretary make a pre-recoupment waiver decision, and that the decision, like that concerning the fact of the overpayment, be accurate. In the imperative voice, it says "there shall be no adjustment of payments to, or recovery by the United States, from any person" who qualifies for waiver. See, Mattern v. Weinberger, 519 F.2d at 166, and n.32. Echoing this requirement, §204(a) says that only "proper" adjustments or recoveries are to be made. The implication is that a recoupment from a person qualifying under §204(b) would not be "proper."

442 U.S. at 693-94 (footnotes omitted) (emphasis added).

In Yamasaki this Court found that a waiver hearing must precede collection[17] because, "it is reasonable to infer that in this particular statute Congress did not intend to exalt recovery over waiver." 442 U.S. at 693, n.9. This Court interpreted the waiver statute as evidencing a Congressional concern for fair-

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[17] This Court held:

> Neither [statute] addresses the timing of a hearing, but both speak in mandatory terms and imply that the mandated act--here waiver of recoupment,...is to precede other action.

442 U.S. at 695.

ness:

> In particular, this Court has been willing to assume a congressional solicitude for fair procedure, absent explicit statutory language to the contrary. See Greene v. McElroy, 360 U.S. 474 (1959).

442 U.S. at 693.

The only exception to the pre-recoupment notice and hearing rights of overpaid beneficiaries concerns disputes involving computational errors regarding the amount of overpayment. Yamasaki at 696. In such cases, this Court held written review to be sufficient. The Lugo majority misapplied this exception in Yamasaki as support for the netting regulations. In fact, however, the netting period is not a matter of mathematical certainty at all. The dates and amounts can be easily manipulated by the Secretary to maximize the amount of recovery and minimize the funds available to beneficiaries for waiver. The open-ended netting period could conceivably "involve recapture of overpayments made even a quarter century ago." Lugo v. Schweiker, 776 F.2d at 1155 (Gibbons, J. dissenting).[18]

III. The Secretary inaccurately assesses the practical importance of the issue in this case because he relies on groundless speculation.

The Secretary's estimation of the practical importance of this case is without foundation. First, the Secretary estimates that the netting procedures will apply to about 300,000 retirement and survivors insurance program beneficiaries annually and to thousands of others in the remaining programs. (Pet. 17). There is no authority cited for this estimate, and

[18] This point is well illustrated by the facts in Angel Lugo's case. See Lugo, 776 F.2d at 1150, n.8. Mr. Lugo's underpayment continued for a four-year period from 1976-1980. The Lugo Court recognized that netting caused a hardship for him but characterized it as an "unusual situation." In fact, however, several of the named respondents in this case were subjected to equally long and arbitrary netting periods.

indeed the Secretary does not know how many netting cases exist. As the Secretary indicated, he was ordered to identify all class members (netting recipients and beneficiaries within the Tenth Circuit) by February 20, 1989. (Pet. 7, n.4). Shortly after filing this petition for certiorari, the Secretary asked the federal district court in Colorado to stay proceedings, including the requirement of identifying class members. See Defendants' Motion for Stay, February 17, 1989. In his brief accompanying that motion, the Secretary stated, "SSA could not identify actual class members by an automated process since SSA's computer records do not contain a code or other characteristics which would indicate that the netting methodology was applied in the calculation of a payment (Affidavit of Jack Gallagher, para. 2)." Defendants' Brief in Support of Stay Motion, February 7, 1989, p.4. Thus, the best that can be said is that no one knows for sure how many netting cases there are annually in the Tenth Circuit or nationwide.

Second, the Secretary maintains that the additional outlay for 300,000 netting recipients nationwide would be "quite substantial, as the average error involved in each case of underpayment has been estimated at almost $600." (Pet. 18-19). This estimate is directly at odds with the Secretary's earlier assertion to the district court that "SSA has no data about potential program costs because there is no method for determining the amount of an average 'underpayment' netted against an 'overpayment.'" See Affidavit of Karen Wilson attached to Defendants' Brief in Support of Stay Motion, June 3, 1987, para. 11.

Third, the Secretary continues to claim that the elimination of the netting procedures will necessarily result in a costly, inefficient, and burdensome administrative process. The Tenth Circuit found reasonable plaintiffs' suggestion that the

Secretary could provide one notice of total overpayments and total underpayments, so long as the two amounts are not netted. (Pet. App. 11a-12a, n.5). It goes without saying that the plaintiffs' suggested alternative to the Secretary's netting procedures is only one of many possible alternatives which the Secretary could employ within his discretion to address cases involving both overpayments and underpayments.

Moreover, the Secretary's claims of strains on the federal treasury or the Social Security Trust Fund if he is forced to forego netting are greatly exaggerated. SSA itself estimates that for any given fiscal year, "approximately 80% of the resolved debt is collected, and approximately 20% is written off as uncollectible." Wilson Affidavit, supra, at para. 11. There is no reason to believe that the use of an alternative to the netting procedure would result in lower recovery rates of "resolved debt."

In addition, the Secretary's experience with waiver requests strongly suggests that there would be little additional administrative burden if claimants were given an opportunity to seek waiver of the entire alleged overpayment in netting cases. In fiscal year 1982, only 7.2 percent of allegedly overpaid OASDI claimants (113,342 of 1,579,980) even requested waivers of overpayments. Hearing on Social Security Administrative Issues Before the Subcomm. on Social Security of the House Comm. on Ways and Means, 97th Cong., 2d Sess. 35 (Sept. 23, 1982) (written statement of SSA Commissioner John A. Svahn). Only 49,158 of the waiver requests were approved, representing $37.8 million of total overpayments of $1.1 billion. Id. Cf. Califano v. Yamasaki, 442 U.S. 682, 686 n.2 (1979) (in 1977 only 3.4 percent of those subject to recoupment sought waiver). Similarly, in the SSI program, for the first nine months of calendar year 1982, only 8.3 percent of allegedly overpaid SSI recipients (43,832 of

529,100) requested waivers. Hearing, supra, at 35. According to the Secretary, 38,131 SSI waiver requests were approved, representing $19.4 million of $250.9 million. Id. These statistics suggest that the Secretary could reasonably anticipate that 7 or 8 percent of the 300,000 "netted" beneficiaries would seek to exercise their waiver rights. Indeed, the actual administrative burden to the Secretary would be even less, since presumably some of those "netted" beneficiaries with a net overpayment (such as Mr. Zwiezen and Mrs. Wise) already seek waivers. Thus, a careful analysis indicates that an alternative to the Secretary's netting regulations would not be administratively burdensome to the Secretary.

In conclusion, until the Tenth Circuit's decision is implemented, its practical significance will not be known. Since the Secretary has not made a strong showing of the practical impact of this case, the Court should allow the Tenth Circuit's decision to be implemented.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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REPLY

BRIEF

No. 88-1323

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In the Supreme Court of the United States

OCTOBER TERM, 1988

LOUIS W. SULLIVAN, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL., PETITIONERS

v.

SANDRA EVERHART, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY MEMORANDUM FOR THE UNITED STATES

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SANDRA EVERHART, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY MEMORANDUM FOR THE UNITED STATES

Respondents do not deny that the decision of the United States Court of Appeals for the Tenth Circuit in this case conflicts with the opinions of the Third and Eighth Circuits upholding the Secretary's "netting" regulations, 20 C.F.R. 404.504, 416.538. Nor do they deny that this case is worthy of review by this Court. Instead respondents urge summary affirmance (Br. in Opp. 7). In support of that suggestion, however, respondents merely repeat the Tenth Circuit's erroneous analysis of the statutory provisions governing payment-error correction, and ignore the far-reaching consequences of the court's ruling on the administration of the Title II and Title XVI benefits programs. We have explained more fully in our petition why the Tenth Circuit's decision is wrong and why the question presented is plainly substantial. Accordingly, only a brief reply is warranted.

1. Respondents reiterate (Br. in Opp. 7) the Tenth Circuit's conclusion that the "plain and unequivocal language of the waiver statute" forbids application of the netting methodology prior to consideration of waiver. As we explain in the petition (at 11-12 & n.7), however, there is nothing in the history of these enactments to suggest that the terms "adjustment or recovery" in Sections 204(b) and 1631(b)(1)(B) were intended to refer to offsets against past underpayments, and much to suggest otherwise. The evolution of the statutory language indicates that the terms "adjustment or recovery" refer only to specified measures the Secretary was authorized take to collect excess amounts mistakenly paid out—that is, to an "adjustment" of future benefit payments or a "recovery" in the form of a legal action demanding a refund from the recipient's estate or from assets in the recipient's possession. The current version of the waiver provisions buttresses this view by describing "adjustment" as an "appropriate adjustment[] in *future* payments to such individual" (42 U.S.C. 1383(b)(1)(A) (Supp. IV 1986) (emphasis supplied)), and "recovery" as the requirement that "such overpaid person or his estate * * * refund the amount in excess of the correct amount * * * *" (42 U.S.C. 404(a)(1)(A) (Supp. IV 1986)).

Moreover, like the court of appeals, the Brief in Opposition fails to give the proper degree of deference to the Secretary's construction of the meaning of terms appearing in the waiver provisions—an interpretation that fully takes into account the overall structure of the sections governing payment error correction. As respondents note (Br. in Opp. 8), the court of appeals relied on the statute's "distinct treatment for overpayments and underpayments"—that is, the provision for automatic reimbursement of shortfalls, as opposed to the requirement of a waiver inquiry prior to recovery of excesses—to justify its rule that the two types of error must be strictly segregated

on a monthly basis. But, we have already pointed out why that reliance is misplaced (Pet. 10-13). The texts of Sections 204 and 1631(b)(1) do not use the terms "underpayment" or "overpayment," and do not require the Secretary to consider waiver before correcting every error made in one or more months. On the contrary, the statute directs the Secretary to determine whether "more or less" than the correct amount of benefits has been paid, and places no restrictions on the method by which the determination is to be made. The term "more or less" is not defined in any provision of the Social Security Act, and the Secretary is not limited to corrections of errors on a monthly basis.

In short, contrary to respondents' and the court of appeals' assertion, there are no "mandatory statutory provisions" that prohibit the Secretary from using the common business method of offset (Br. in Opp. 9). It is not the discovery of an "overpayment" in one or more months that triggers the Secretary's obligation to consider a waiver; rather, it is the Secretary's attempt to seek adjustment or recovery—a step the Secretary cannot take until it is determined that "more * * * than the correct amount of payment has been made." The plain language of the provisions authorizing the Secretary's determination of error, Sections 204(a) and 1631(b)(1)(A), therefore clearly permits the Secretary to use the netting method.[1]

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[1] Respondents' contention (Br. in Opp. 10-12) that this Court's decision in *Califano* v. *Yamasaki*, 442 U.S. 682 (1979) is incompatible with the use of the netting methodology turns entirely on the erroneous assumption that the offsetting of past excess payments against past underpayments is a form of "adjustment or recovery" that must be preceded by an opportunity for a hearing. But the *Yamasaki* Court, which ruled that computational disputes concerning the accuracy of the Secretary's determination of past errors need not be re-

2. Respondents also fail to address our contention (Pet. 14) that the Secretary's interpretation of the waiver provisions enacted by Congress is not only permissible, but is more reasonable than the Tenth Circuit's construction. The Secretary's practice of aggregating all errors made in the past assures that subsistence beneficiaries always receive an opportunity for a waiver hearing before any affirmative recovery is attempted. At the same time, it avoids requiring the Secretary to overpay thousands of individuals who have received all the benefits to which they are entitled. In contrast, the Tenth Circuit's requirement that the Secretary keep a separate account of all underpayments and overpayments not only would mandate the disbursement of much larger amounts to all previously netted beneficiaries, but it would have other unavoidable consequences that respondents choose to ignore or attempt to minimize by misrepresenting statements made by HSS officials during the course of litigation.[2] Most

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solved in a face-to-face hearing, placed no restrictions on the method the Secretary could use to compute a past error.

Respondents also misrepresent the plain terms of the netting regulations in asserting (Br. in Opp. 12) that they create an open-ended netting period that is subject to manipulation by the Secretary to "minimize the funds available to beneficiaries for waiver." The period over which errors can be taken into account is the very opposite of "open-ended": it closes with "the month the initial determination of overpayment or underpayment is made." 20 C.F.R. 416.538; see also Pet. 5. Thus, once the Secretary discovers that there has been a mistake in a monthly payment, he is not permitted to hold open the netting period to offset that error against future shortfalls or excesses. He can only look backwards to the "first month for which there is a difference" between the amount paid and the correct amount due.

[2] Respondents claim (Br. in Opp. 13) that the October 1987 estimate by the General Accounting Office of the magnitude of the average underpayment, cited in the petition (at 19), contradicts a statement made by an HHS attorney, Karen Wilson, in an affidavit filed earlier

notably, respondents' suggestion (Br. in Opp. 13-14) that the invalidation of netting will entail nothing more than the obligation to list an additional number on a notice form is refuted by our account (Pet. 19) of how separate accounting will create a large, new class of beneficiaries with outstanding overpayments.

Respondents assert that, because only a small percentage of beneficiaries notified of outstanding overpayments request forgiveness, the creation of such a new class of

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in 1987, to the effect that the Secretary has no record of the amounts of the component monthly errors that are added together by netting. These two statements, however, refer to entirely different matters. The number provided in the GAO Report (see Pet. 17 n.12) represents the average of all *final* underpayments that the Secretary is required to reimburse. It takes into account all "pure" underpayments as well as the far smaller number of underpayments that result from netting of mixed errors. The figure was cited in the petition to provide a rough estimate of the magnitude of the new set of underpayment errors that the Secretary will be required to reimburse separately if netting is prohibited. Because the Secretary must keep records of the amounts owed and repaid to individual beneficiaries, the Secretary has ready access to the information referred to in the GAO report. The same is not true of the information described by Ms. Wilson, since the Secretary has no reason to keep track of the component monthly errors that go into the computation of a net error amount.

Respondents also attempt (Br. in Opp. 12) to cast doubt on the Secretary's estimate (Pet. 17) of the number of beneficiaries netted yearly by adducing a purportedly contradictory statement by Jack Gallagher, an HHS official, that there is no computer method by which beneficiaries whose errors have been netted can be individually identified. Once again, there is no inconsistency. The 300,000 estimate was arrived at by a statistical sampling method, not by searching a computer file for the name of every beneficiary to whom netting had been applied. As Mr. Gallagher stated in his affidavit to the district court, the task of producing such a list of names – which is very different from estimating an overall number of recipients with past "mixed" errors – is one the HHS computer cannot be programmed to carry out.

beneficiaries will not significantly increase the agency's workload (Br. in Opp. 14).[3] However, even if beneficiaries from whom recovery is sought continue to request waivers at the same rate, HHS can still expect to be deluged with more than 10,000 new applications for forgiveness requiring an intensive and detailed case-by-case investigation and a hearing. In any event, the processing of additional waiver requests is only one of the inevitable administrative effects of the court of appeals' separate accounting requirement. Respondents fail to discuss the consequences that are of greatest concern to an already overburdened agency—the paperwork and time required to process, monitor, and collect overpayments that do not qualify for waiver. And respondents themselves point out that fully one fifth of the newly created outstanding debt that the Secretary is entitled to recoup will never be collected. See Br. in Opp. 14. This further compounds the costs to the government of an unnecessary revision in its established method for correcting payment errors.

For the foregoing reasons and those given in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

WILLIAM C. BRYSON
Acting Solicitor General

MAY 1989

[3] The invalidation of netting may well generate a higher percentage of waiver requests by creating a greater incentive to seek forgiveness. As the petition points out (at 18 & n.13), separate accounting will lead to an increase in the amount owed ~~to~~ by the government ~~by~~ those beneficiaries whose past overpayments would otherwise have been reduced by offset. Because, for this group, the obligation to repay will become more onerous than it would have been after netting, it is reasonable to expect that these beneficiaries will request waivers of recoupment more frequently.

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PETITIONER'S

BRIEF

Supreme Court, U.S.
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CLERK

No. 88-1323

In the Supreme Court of the United States

OCTOBER TERM, 1989

LOUIS W. SULLIVAN, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL., PETITIONERS

v.

SANDRA EVERHART, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTION PRESENTED

Whether Social Security regulations that require netting of all payment errors to a recipient in a past period to determine whether there has been an underpayment (subject to reimbursement) or an overpayment (subject to recovery or waiver of recovery) are within the agency's statutory authority.

II

PARTIES TO THE PROCEEDING

Petitioners are the Secretary of Health and Human Services and the Commissioner of Social Security. Respondents are plaintiffs Sandra and Thomas Everhart and Myron Zenick and intervenors Emil Zweizen and Berline Wise, representing a Tenth Circuit-wide class of Title II and Title XVI beneficiaries, certified by the district court, whose erroneous payments "were recovered pursuant to the Secretary's netting regulations on or after December 8, 1986" and who "have made or will make a claim to the Secretary not to have the netting policy applied in their cases" (Pet. App. 27a).

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BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-16a) is reported at 853 F.2d 1532. The order and ruling of the district court (Pet. App. 17a-25a), and the district court order certifying a class on remand (Pet. App. 26a-27a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 12, 1988. A petition for rehearing with suggestion for rehearing en banc was denied on October 24, 1988. On January 13, 1989, Justice White extended the time for filing a petition for a writ of certiorari to February 7, 1989.

The petition was filed on that date and was granted on May 22, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Section 204(a) and (b), 42 U.S.C. 404(a) and (b) and Section 1631(b)(1), 42 U.S.C. 1383(b)(1) (Supp. IV 1986) of the Social Security Act are reproduced at App., *infra*, 1a-4a. Social Security regulations 20 C.F.R. 404.504 and 416.538 are set forth at App., *infra*, 4a-5a.

STATEMENT

A. Statutory and Regulatory Scheme

1. Title II of the Social Security Act, 42 U.S.C. 401 *et seq.* (1982 & Supp. IV 1986), originally enacted in 1935, establishes an insurance program to pay cash benefits to elderly and disabled workers and their survivors and dependents. Title XVI of the Act, 42 U.S.C. 1381 *et seq.* (1982 & Supp. IV 1986), also known as the Supplemental Security Income (SSI) program, was enacted in 1972 and went into effect on January 1, 1974. The SSI program provides for the payment of benefits to financially needy individuals who are aged, blind, or disabled.

Each month, the Social Security Administration (SSA), a unit of the Department of Health and Human Services (HHS), issues more than 40 million payments to beneficiaries under the Title II and Title XVI programs. All but a small percentage of these payments correctly reflect the amount of benefits to which the recipients are entitled. Mistakes are inevitable, however, in programs of this magnitude and complexity. For example, overpayments can result under Title II if a beneficiary underestimates or fails to report the amount of actual or

estimated earned income (see 42 U.S.C. 403(a) and (h), 415); fails to inform the Secretary of an award of workers compensation benefits (42 U.S.C. 424a); neglects to report, in the case of a minor child receiving survivor's benefits, that he is no longer a full-time student (see 42 U.S.C. 402(d)); or neglects to report, in the case of a widow or divorced wife, either that she has remarried (42 U.S.C. 402(e) and (f)) or that a child is no longer under her care (42 U.S.C. 402(g)). Similarly, under Title XVI, there are parallel factors that, if incorrectly or belatedly reported, can result in an inaccurate payment. See, *e.g.*, 42 U.S.C. 1382a (describing the effect of outside income on the level of benefits); 42 U.S.C. 1382(b) (providing that the level of benefits is dependent on a spouse's benefits under the program); 42 U.S.C. 1382c(b)-(f) (describing the effect of family composition, age and number of children, and family members' resources on eligibility). Even if the information furnished to the Secretary is correct, administrative delays, miscalculations, and misapplication of applicable statutes and regulations contribute to errors in the amount of a monthly benefit payment.[1]

2. Recognizing that errors would be made in administering these massive entitlement programs, Congress

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[1] In 1982, SSA identified 1.5 million overpayment errors under the Title II Retirement, Survivors, and Disability Insurance (RSDI) program, and over 500,000 overpayment errors under the SSI program. See *Hearing Before the Subcomm. on Social Security of the House Comm. on Way and Means*, 97th Cong., 2d Sess. 35 (1982). According to a more recent estimate by the General Accounting Office, payment errors of various types affected between 4 and 5 million beneficiaries in the Title II RSDI program per year between 1980 and 1986. See *Social Security: Payment Accuracy Rates Are Overstated, United States General Accounting Office Report to the Chairmen, U.S. Senate Subcomm. on Labor, Health and Human Services, and Education, Comm. on Appropriations* 19 (Oct. 1987).

enacted provisions under both Titles that empower the Secretary to rectify such mistakes. These provisions, Section 204 of Title II and Section 1631(b)(1) of Title XVI, 42 U.S.C. 404 and 1383(b)(1) (Supp. IV 1986), require the Secretary to correct errors in past payments whenever the beneficiary has received "more or less" than the amount to which he is entitled. The Title II provision, Section 204, is divided into two subsections. Section 204(a)(1) states that "[w]henever the Secretary finds that more or less than the correct amount of payment has been made to any person under [Title II], proper adjustment or recovery shall be made, under regulations prescribed by the Secretary." If the Secretary determines that "less than the correct amount" has been paid, the recipient is entitled to reimbursement of that amount. Section 204(a)(1)(B), 42 U.S.C. 404(a)(1)(B) (Supp. IV 1986). If the recipient has received "more than the correct amount," Section 204(a)(1)(A) requires the Secretary to "decrease any payment" under Title II to the recipient or to "require such overpaid person * * * to refund the amount." However, Section 204(b) directs that "there shall be no adjustment of payments * * * or recovery by the United States" if the recipient was "without fault" and if "such adjustment or recovery would defeat the purpose of [Title II] or would be against equity and good conscience." 42 U.S.C. 404(b). In *Califano* v. *Yamasaki*, 442 U.S. 682 (1979), this Court held that recipients who request a waiver under this section are entitled to an oral hearing prior to any recovery or adjustment of benefits.

The parallel SSI provision is worded and arranged somewhat differently, but is similar in purpose and effect.[2] Section 1631(b)(1)(A) of Title XVI, 42 U.S.C.

[2] The Title XVI payment error provision, enacted as part of the Social Security Amendments of 1972 creating the SSI program, was closely modeled on the corresponding Title II provision, which had been revised in 1967 to incorporate the language presently in force. See pp. 28-29, *infra*. See Pub. L. No. 92-603, § 301, 86 Stat. 1475. In 1980, the Title XVI payment error correction provision was revised slightly, redesignated as Section 1631(b)(1), and divided into subsections ((A) and (B)) to create the present version of the provision. See Technical Corrections Act of 1979, Pub. L. No. 96-222, § 101(a)(2)(C), 94 Stat. 195; Act of Oct. 19, 1980, Pub. L. No. 96-473, § 6(h), 94 Stat. 2266 (correcting a numbering error in subsection (b)).

1383(b)(1)(A) (Supp. IV 1986), states that whenever the Secretary finds "that more or less than the correct amount of benefits has been paid" to a recipient, the Secretary shall make "proper adjustment or recovery." The "adjustment or recovery" is to be made "by appropriate adjustments in future payments to such individual or by recovery from such individual [or his eligible spouse or estate], * * * or by payment to such individual." In the event that a beneficiary has been overpaid, however, Section 1631(b)(1)(B), 42 U.S.C. 1383(b)(1)(B) (Supp. IV 1986) requires the Secretary to "make such provision as he finds appropriate * * * with a view to avoiding penalizing such individual * * * who was without fault," if "adjustment or recovery * * * would defeat the purposes of this subchapter, or be against equity and good conscience, or (because of the small amount involved) impede efficient or effective administration."

3. This case concerns the validity of regulations, known as the "netting" regulations, promulgated by the Secretary to implement the foregoing statutory provisions. 20 C.F.R. 404.504 (Title II); 20 C.F.R. 416.538 (Title XVI); see App., *infra*, 4a-5a.[3] These regulations authorize

[3] The netting procedure is expressly set forth only in the Title XVI regulation, 20 C.F.R. 416.538. However, Social Security Ruling (SSR) 81-19a (1981) provides that the netting methodology prescribed under the Title XVI regulation also applies to the calculation of payment error amounts under the Title II regulation.

the Secretary to add together, or "net," all past overpayments and underpayments of benefits that a beneficiary has received up through the month before the Secretary becomes aware of a mistaken payment. If the netting process reveals a net underpayment, then the Secretary pays the beneficiary what is due. If, however, the process reveals a net overpayment, the Secretary must then decide if the statute requires waiver of the debt before any "adjustment or recovery" may take place. Although the Secretary is entitled under the regulations to take into account all past errors in computing the total amount of payment error, the regulations do not permit the Secretary to hold open the netting period to offset past errors against any future shortfalls or excesses that may occur. Once the Secretary discovers a mistake in a payment in some previous month, he can only look "backwards" from the month he first discovers the error to the "first month for which there is a difference" between the amount paid and the correct amount due. 20 C.F.R. 416.538.

B. The Proceedings in this Case

1. Respondents in this case—the three original plaintiffs and two intervenors in the proceedings below—all received benefits under Title II or Title XVI during some period prior to commencement of this lawsuit.[4] The Secre-

[4] For example, Sandra Everhart was receiving Social Security disability benefits and SSI benefits, and Thomas Everhart was receiving SSI benefits at the time of their marriage in September 1984. See Pet. App. 3a. Because of mistakes in the couple's estimates of their earnings and delays in the adjustment of levels of benefits to take into account their change in matrimonial status, both Thomas and Sandra were paid too little in some months and too much in other months immediately before and after their marriage. In January 1985, the errors were discovered and the Secretary determined that from August 1984 to January 1985, the Everharts together had incurred a net underpay-

tary found that each of the respondents had received too much money during some past months and too little money in other months. He therefore applied the netting regulations to calculate a net past payment error for each. The three original plaintiffs were found, after netting, to have incurred net underpayments. Pet. App. 3a. Accordingly, the Secretary paid them the net amount due. In accordance with the regulations, however, the Secretary did not segregate overpayments from underpayments, or give separate consideration to the excess amounts they received for months in which they were overpaid. Thus, the named plaintiffs were not afforded an opportunity to request a waiver of repayment with respect to their overpayments considered separately from their underpayments.

Respondents filed a class action in the United States District Court for the District of Colorado seeking declaratory and injunctive relief against the Secretary and the Commissioner of SSA. They claimed that the Secretary's netting procedure violated the Social Security Act and denied them due process of law.[5] In their view, the statute required the Secretary to segregate past overpayments and past underpayments into separate accounts, to pay over the total amount of all past underpayments, and then to apply the waiver of recoupment procedures to the total of all past overpayments.

ment of $407, based on total underpayments of $596 and total overpayments of $189. The net underpayment was paid to them. *Ibid.* Gov't C.A. Br. 8 n.8. HHS informs us that as a result of this litigation, their payment errors were recomputed without using the netting method. They received a check for the remaining amount of total underpayments considered separately, and HHS abandoned efforts to recoup the total overpayments.

[5] Because both courts below held that the regulations contravened the statute, neither considered the constitutional challenge.

Ruling from the bench, the district court (Pet. App. 20a-25a) granted respondents' motion for summary judgment. Expressly disagreeing with the decision of the Third Circuit in *Lugo* v. *Schweiker*, 776 F.2d 1143 (1985), which had upheld the netting regulations against a similar challenge, the court adopted the view set forth in Judge Gibbons' dissenting opinion in *Lugo* to the effect that the Secretary's regulations had accomplished an "end run * * * around both the waiver statutes and the Supreme Court's decision in *Califano* v. *Yamasaki*." The court reiterated Judge Gibbons' conclusion that "the netting regulations permit the Secretary to accomplish what the waiver provisions plainly and unequivocally forbid; namely a recovery by the United States of overpayments without a hearing on waiver." Pet. App. 22a (quoting *Lugo* v. *Schweiker*, 776 F.2d at 1156 (Gibbons, J., dissenting)). The court remanded the respondents' claims to the Secretary for recalculation of their payment errors without employing the netting method, and further enjoined the Secretary from applying that method to any Title II and Title XVI beneficiaries in the State of Colorado. Pet. App. 17a-19a.

2. The court of appeals affirmed the judgment as to the named respondents.[6] The court acknowledged (Pet.

[6] The court reversed the district court's grant of statewide injunctive relief on the ground that no class had been certified, and remanded for further proceedings (Pet. App. 16a & n.7). On remand, the district court certified a circuit-wide class of Title II and Title XVI beneficiaries whose erroneous payments "were recovered pursuant to the Secretary's netting regulations on or after December 8, 1986" (Pet. App. 27a) and who "have made or will make a claim to the Secretary not to have the netting policy applied in their cases" (*ibid.*). The Secretary was ordered to identify all class members by February 20, 1989 (*ibid.*).

On February 17, 1989, petitioners filed a Motion for a Stay of Proceedings pending this Court's response to the government's petition for a writ of certiorari. Following the grant of certiorari on May 22, 1989, the district court ordered a partial stay of its original class certification order. The new Order incorporated an agreement of the parties that HHS would prospectively preserve the records of Title II and Title XVI cases in the Tenth Circuit in which the netting methodology was applied, but did not otherwise compel the Secretary to comply with the Tenth Circuit's decision pending this Court's consideration and decision. Stipulation and Order for Partial Stay and For Prospective Identification of Class Members, Civ. No. 85-Z-2590 (D. Colo. June 19, 1989).

App. 9a-10a) that its ruling was at odds with the decisions of the Third Circuit in *Lugo* v. *Schweiker, supra,* and the Eighth Circuit in *Webb* v. *Bowen,* 851 F.2d 190 (1988). The court further acknowledged that Sections 205(a) and 1631(d)(1) of the Social Security Act, 42 U.S.C. 405(a), 1383(d)(1) (1982 & Supp. IV 1986), explicitly grant discretion to the Secretary to establish procedures implementing the Act's provisions (Pet. App. 11a), and that "the Act does not specify over what past time period there must be a determination of payment errors" (*ibid.*). The court nevertheless concluded that "the statute is not silent regarding the differential treatment of overpayments and underpayments and the mandatory waiver of recovery in appropriate instances" (*ibid.*). Relying on Judge Gibbons' dissent in *Lugo* v. *Schweiker,* 776 F.2d at 1154, the court explained that "[a]lthough the disputed regulations treat overpayments and underpayments equally in providing the methodology for computing a single net amount, the statute makes a clear differentiation. * * * While the provisions relating to underpayments mandate payment without qualification, the recovery of overpayment provisions are qualified by the waiver of recoupment procedures" (Pet. App. 10a).

In the court's view, the Secretary had "overlook[ed] the inescapable fact that by offsetting overpayments against

underpayments, the SSA has effectively recovered overpayments without complying with the statutorily mandated waiver of recoupment procedures" (Pet. App. 10a). This had resulted in "the deprivation of recipients' rights to notice and a waiver hearing prior to recoupment or adjustment" (*ibid.*), in violation of this Court's decision in *Califano* v. *Yamasaki*, 442 U.S. 682, 697 (1979). According to the court, it was clear after *Yamasaki* that there could be no recovery "when waiver is proper" (*id.* at 693-694). Because, the court explained, " '[n]o recovery means no recovery by setoff, and no recovery by suit; no recovery at all' " (Pet. App. 11a (quoting *Lugo* v. *Schweiker*, 776 F.2d at 1154 (Gibbons, J., dissenting))), the failure to consider waiver before applying the netting procedure was inconsistent with the Act. The court concluded that there were "inherent conflicts between the regulations and the recoupment and waiver of recoupment provisions" (Pet. App. 10a) and held the regulations invalid for failing to require the Secretary to make a separate calculation of total overpayments and total underpayments before applying the Act's remedial procedures (*id.* at 13a).

The court of appeals rejected the Secretary's argument that elimination of the netting methodology would "result in a much more complex system for dealing with payment errors" (Pet. App. 11a n.5). Instead, the court found "reasonable" respondents' position that one notice containing a separate list of all overpayments and underpayments would comport with the statute, and concluded that such a requirement would impose on the Secretary "no greater burden to provide notices and hearings than that already imposed under the statute and the Supreme Court's interpretation of the waiver provisions" (*id.* at 12a n.5). The court noted, in addition, that even if netting "may be an acceptable practice in a business context," business entities "are not constrained by mandatory

statutory provisions." Although acknowledging that netting might be "desirable from an administrative standpoint," the court admonished that "administrative convenience cannot be countenanced when the netting regulations contravene the plain language of the statute" (*id.* at 11a).

SUMMARY OF ARGUMENT

The court of appeals in this circuit-wide class action invalidated a procedure that has been used by the Secretary of Health and Human Services for more than fifteen years to correct errors in payments made to beneficiaries under two of the largest federal entitlement programs. The regulations that prescribe this procedure fairly and efficiently resolve hundreds of thousands of claims each year under the Title II and SSI programs that arise from errors involving both excessive and deficient monthly payments to the same individual.

In holding that the netting procedure is inconsistent with the statutory payment correction provisions, the court of appeals struck down regulations that implement programs Congress has entrusted to the Secretary's administration, and that represent the considered product of the Secretary's administrative judgment. Congress has granted the Secretary, by an express delegation of authority, especially broad discretion to choose procedures to administer the Title II and Title XVI programs. See 42 U.S.C. 405(a), 1383(d)(1) (1982 & Supp. IV 1986). Indeed, in the Title II error provision itself, 42 U.S.C. 404, Congress explicitly delegated authority to promulgate regulations to implement that section. This Court has repeatedly stressed that, under these circumstances the scope of review of an agency's regulations is narrowly circumscribed. See *Batterton* v. *Francis*, 432 U.S. 416, 425 (1977); *Schweiker* v. *Gray*

Panthers, 453 U.S. 34, 43 (1981); *Heckler* v. *Campbell,* 461 U.S. 458, 466 (1983); *Bowen* v. *Yuckert,* 482 U.S. 137, 145 (1987).

In overturning the Secretary's longstanding practice, the court of appeals stated that the "plain language" of the payment correction provisions of the statute forbids application of the netting methodology prior to consideration of waiver. The court (Pet. App. 10a) pointed to the statute's "differential treatment" for overpayments and underpayments—that is, the provision for automatic reimbursement of shortfalls, as opposed to the requirement of a waiver inquiry prior to any "adjustment" or "recovery" of excesses—to justify its rule that the two types of error must be strictly segregated. The court concluded that the process of offsetting underpayments and overpayments is a form of "adjustment or recovery" that may not take place until the Secretary has considered waiver.

There is, however, nothing in the history of Sections 204 and 1631(b)(1) to suggest that the terms "adjustment or recovery" were intended to refer to offset of past overpayments against past underpayments, and much to suggest otherwise. The evolution of the statutory language indicates that the terms "adjustment" and "recovery" refer only to certain types of affirmative measures the Secretary is authorized to take to collect excess amounts mistakenly paid out—that is, to an "adjustment" of future benefit payments or a "recovery" in the form of a legal demand for a refund from the estate of the recipient or from assets in the recipient's possession. The current version of the waiver provisions buttresses this view by describing "adjustment" as an "appropriate adjustment[] in *future* payments to such individual" (42 U.S.C. 1383(b)(1)(A) (Supp. IV 1986) (emphasis supplied)), and "recovery" as the requirement that "such overpaid person or his estate

* * * *refund* the amount in excess of the correct amount" (42 U.S.C. 404(a)(1)(A)(Supp. IV 1986) (emphasis supplied)).

Moreover, even assuming that Congress did not definitively resolve the meaning of the key statutory terms "adjustment" and "recovery," there is no doubt that the netting procedure is consistent with a permissible and reasonable construction of the statutory language. The statutes direct the Secretary to determine whether "more or less than the correct amount" of benefits has been paid. The term "more or less" is not defined in any provision of the Social Security Act, and the statute places no restriction on the method by which that determination is to be made, or the period over which errors may be considered in making the determination.

It is only after the Secretary determines that "more * * * than the correct amount" has been paid under Section 204(a)(1) or 1361(b)(1)(A), that he is ready to make an "adjustment or recovery" of the excess payment, and must consider whether waiver is appropriate. Thus, the netting procedure is fully consistent with the statutory design.

In directing the Secretary to waive recovery from overpaid beneficiaries under certain circumstances, Congress was concerned to ensure that, in the course of rectifying *past* mistakes, the Secretary would not undermine the underlying purpose of the entitlement programs by intentionally inflicting *future* hardship on program beneficiaries. The Secretary's practice of aggregating all errors made in the past honors that concern by guaranteeing that subsistence beneficiaries receive an opportunity for a hearing on waiver before the Secretary attempts any affirmative recovery. At the same time, in contrast to the separate accounting procedure mandated by the Tenth Circuit, the practice of netting all past errors avoids im-

posing a requirement that the Secretary in effect *overpay* thousands of individuals who have received all the benefits to which they are entitled, and relieves the agency of the obligation to then attempt to recover excess payments that have been deliberately paid out in this manner.

The Tenth Circuit's rule would require HHS to set aside large reserves of cash for paying the much larger amounts that the Secretary would owe to previously netted beneficiaries in order to reimburse them for all underpayments considered separately. And, by creating a huge new class of overpaid beneficiaries (who previously would have owed nothing because the government's debt to them would have been applied against their debt to the government) the court of appeals rule would inundate the agency with additional paperwork and demands for processing, monitoring, and collecting overpayments that do not qualify for waiver. HHS could also expect an upsurge in applications for forgiveness, requiring intensive and detailed case-by-case investigation and face-to-face hearings. The agency is ill-equipped to handle this extra workload, and nothing in the court of appeals decision, or the Social Security Act itself, justifies the imposition of these onerous and unreasonable responsibilities.

ARGUMENT

THE SECRETARY'S REGULATIONS REQUIRING THE "NETTING" OF PAST OVERPAYMENTS AND UNDERPAYMENTS OF BENEFITS UNDER TITLE II AND TITLE XVI ARE FULLY CONSISTENT WITH THE STATUTORY PROVISIONS FOR THE CORRECTION OF PAST PAYMENT ERRORS

A. Because the Secretary has Broad Authority to Issue Regulations to Implement the Payment Correction Provisions of Title II and Title XVI, and Because the Regulations Promulgated under that Authority Have Been Consistently Maintained over a Long Period of Time, They are Entitled to Great Deference.

The benefits programs under Title II and Title XVI are of monumental proportions. Indeed, the Secretary's task is formidable: billions of dollars must be paid to millions of beneficiaries under a statute that is "among the most intricate ever drafted by Congress." *Schweiker* v. *Gray Panthers*, 453 U.S. 34, 43 (1981); see also *Atkins* v. *Rivera*, 477 U.S. 154, 162 (1986). To accomplish this task, the Secretary must formulate regulations that faithfully carry out the statutory mandate, and yet are capable of practical administration by a large nationwide bureaucracy.

"Perhaps appreciating the complexity of what it had wrought," *Schweiker* v. *Gray Panthers*, 453 U.S. at 43, Congress "conferred on the Secretary exceptionally broad authority to prescribe standards for applying certain sections of the [Social Security] Act." *Heckler* v. *Campbell*, 461 U.S. 458, 466 (1983). The Secretary's authority to adopt procedures implementing the payment correction provisions at issue here derives from two express statutory grants. First, both Title II and Title XVI contain general provisions expressly delegating to the Secretary "full power and authority to make rules and regulations and to establish procedures, not inconsistent with the provisions of [the Act], which are necessary or appropriate to carry

out such provisions." See 42 U.S.C. 405(a); 42 U.S.C. 1383(d)(1) (1982 & Supp. IV 1986) (making Section 405(a) applicable to the SSI program). Second, the payment correction provision of Title II, Section 204(a), directs that proper adjustment or recovery of payment errors shall be made "under regulations prescribed by the Secretary." Taken together, these express grants of authority reveal that Congress conferred especially broad discretion upon the Secretary to devise practical procedures for the implementation of the provisions at issue here.

"In a situation of this kind, Congress entrusts to the Secretary, rather than to the court, the primary responsibility for interpreting the statutory term[s]." *Batterton* v. *Francis,* 432 U.S. 416, 425 (1977). Of course, whenever regulations are challenged on the ground that they are inconsistent with the statute they implement, the first question is "whether Congress has directly spoken to the precise question at issue." *Chevron U.S.A. Inc.* v. *NRDC, Inc.,* 467 U.S. 837, 842 (1984). In answering this question, the court is to employ "traditional tools of statutory construction" (*id.* at 843 n. 8), including an examination of "[t]he words, structure, and history" of the statutory provisions in question. *NLRB* v. *United Food & Commercial Workers Union, Local 23,* 108 S. Ct. 431, 421 (1987); *Young* v. *Community Nutrition Institute,* 476 U.S. 974, 980-981 (1986); *INS* v. *Cardoza-Fonseca,* 480 U.S. 421, 446-449 (1987). But if application of the traditional methods of statutory construction reveals that "Congress has not directly addressed the precise question at issue," the court may not simply impose its own interpretation of the statutory language. Where, as here, "there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation," the courts must defer to the agency's interpretation as long as it is not "arbitrary, capricious or manifestly contrary to the

statute." *Atkins* v. *Rivera,* 477 U.S. at 162 (quoting *Chevron,* 467 U.S. at 844).

The Secretary's regulations at issue here are also entitled to deference because they have been consistently maintained over a long period of time. See, *e.g., Udall* v. *Tallman,* 380 U.S. 1, 16-17 (1965); *FEC* v. *Democratic Senatorial Campaign Comm.,* 454 U.S. 27, 32-38 (1981). The netting policy was first expressly incorporated into the Title XVI regulation at the outset of the SSI program in January 1974. See 39 Fed. Reg. 2,012-2,013 (1974) (proposed rule); 40 Fed. Reg. 47,761-47,763 (1975) (final rule). Although the Title II regulation, as origially promulgated in 1955 (see 20 Fed. Reg. 2,662) and revised in 1969 (see 34 Fed. Reg. 14,888), did not expressly define the netting period, it is nonetheless clear that the Secretary interpreted the Title II regulation to require netting long before adoption of the Title XVI regulation. See 40 Fed. Reg. 47,762 (1975) (noting that the netting procedure described in the Title XVI regulation, 20 C.F.R. 416.538, "reflect[s] the existing practice of the Social Security Administration and [is] essential to the operation" of the payment error provisions).[7] Hence, the Secretary's regulations have expressly embodied the netting procedure for fifteen years, and the agency has informally followed the netting procedure under Title II for an even longer period of time. As such, the Secretary's interpretation is entitled to great deference.

In this case, the court of appeals articulated the correct standard of review and acknowledged that its role in reviewing the Secretary's netting regulations was narrow.

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[7] The internal Social Security Manual revised in 1974 directs administrators to use the offset procedure under Title II. See Social Security Claims Manual § 600.04 (rev. Feb. 12, 1974) ("Simultaneous Underpayments and Overpayments"). We have been informed by HHS that the netting of mixed errors was standard procedure under Title II as far back as the late 1960s.

See Pet. App. 5a. However, the court's application of this standard, and its conclusion that the netting regulations are "inconsistent with the statute," are seriously flawed. Contrary to the lower court's conclusions, the regulations are entirely consistent with the language and history of the Social Security Act and with Congress's equitable goals in providing for a waiver of recoupment scheme. Even assuming that some ambiguity can be found in the statute, see, *e.g.*, *Young* v. *Community Nutrition Institute*, 476 U.S. at 980-981, it is clear that the Secretary's prescribed method for correcting payment errors represents a permissible and reasonable implementation of the statute.

B. The Language, Structure, and History of the Provisions for Correction of Past Payment Errors Make Clear that the Netting of Past Errors is Consistent with the Act.

The central issue of statutory interpretation in this case is whether the provision for waiver of overpayments applies whenever a beneficiary *receives* an overpayment, as respondents maintain and the court of appeals held, or whether that provision comes into play only when the Secretary seeks to *collect* an overpayment, as the netting regulations provide. In resolving this issue, the key question of statutory construction concerns the meaning of the phrase "adjustment or recovery." Both Section 204(b), which sets forth the entitlement to a waiver of recoupment in certain circumstances under the Title II program, and the parallel language in Section 1631(b)(1)(B) (Supp. IV 1986) of Title XVI, provide that a beneficiary may request a waiver only when the Secretary seeks to make an "adjustment or recovery" of overpayments. Respondents contend that the netting of past overpayments against past underpayments is itself a form of "adjustment or recovery." The Secretary's position, on which the netting regulations are

premised, is that the phrase "adjustment or recovery," as used in the Social Security Act, refers only to affirmative methods for collecting past overpayments, either through "adjustments" in future payments or a "recovery" in the form a demand for repayment from the beneficiary or his estate. For the reasons set forth below, we believe the Secretary's construction of the phrase "adjustment or recovery" is not only a permissible one, but is the only reasonable reading of the statute.

1. The statutes make clear that the correction of past payment errors proceeds in two steps. First, the Secretary must determine if there has been a payment error, and if so, what kind and in what amount. Second, the Secretary must determine how, if at all, to rectify that error. With respect to the first inquiry—the ascertainment and calculation of the payment error—the Title II provision simply directs the Secretary to determine whether "more or less than the correct amount of payment has been made to any person under this subchapter." The Title XVI provision uses virtually identical language. See 42 U.S.C. 1383(b)(1)(A) ("more or less than the correct amount of benefits has been paid with respect to any individual"). Clearly, nothing in the directive that the Secretary determine whether "more or less than the correct amount" of benefits has been paid is inconsistent with the netting procedure. To the contrary, the disjunctive "or" implies that the Secretary is expected to find only one or the other type of error for each beneficiary, and to compute no more than a single error amount in each case. This is, of course, precisely what the netting procedure does.

Nor does the statute specify any particular period of time over which the Secretary must conduct the inquiry into whether "more or less than the correct amount" has been paid. Judge Gibbons, dissenting in *Lugo* v.

Schweiker, 776 F.2d at 1153, suggested that the netting procedure, in permitting the Secretary to aggregate all past overpayments and underpayments, was inconsistent with "the basic statutory accounting period," which he identified as resting on the "entitlement to *monthly* benefits." But although Title II insurance programs specify that benefits are to be paid monthly, see 42 U.S.C. 402(a) (describing entitlement to "an old-age insurance benefit for each month"), 42 U.S.C. 423(a) (speaking of entitlement to "a disability insurance benefit * * * for each month"), the provision requiring correction of payment errors, and providing an opportunity for a waiver in cases of overpayment, makes no mention of a monthly or any other accounting period. See 42 U.S.C. 404(a)(1). And although certain provisions of Title XVI require the Secretary to make a determination of *eligibility* for SSI benefits on a monthly basis, see 42 U.S.C. 1382(c)(1) (Supp. IV 1986) (describing factors affecting an individual's "eligibility for a benefit under this subchapter for a month"), that statute permits the Secretary to fix by regulation the frequency of benefit payments to SSI recipients. See 42 U.S.C. 1383(a)(1) ("benefits under this subchapter shall be paid at such time * * * and in such installments * * * as determined under regulations"). Thus, neither Title II nor Title XVI provides any basis for concluding that the determination whether "more or less than the correct amount" has been paid must be undertaken using a monthly accounting period. See *Lugo* v. *Schweiker,* 776 F.2d at 1147.[8]

[8] The Tenth Circuit placed reliance on what it termed the "differential treatment of overpayments and underpayments" in the statute in concluding that separate treatment was prescribed for "overpayments." Pet. App. 11a. But, neither Section 204(a)(1) nor Section 1631(b)(1) uses the terms "overpayment" and "underpayment" in the text of the statute. The terms appear only in the headings of the subsections, where they play no role in defining the Secretary's obligations under the provisions. Thus, contrary to the Tenth Circuit's conclusion, the payment error correction provisions do not prescribe "differential treatment"—indeed, they prescribe no treatment at all—for overpayments and underpayments. Instead, both provisions refer to the payment of "*more* or *less* than the correct amount" of benefits.

The only possible basis in the statute for questioning the netting procedure is found in the provisions describing the second stage of the process—where the Secretary determines how, if at all, he will rectify any payment error that has been identified. With respect to Title II errors, if the threshold inquiry reveals the payment "of less than the correct amount," then under subsection (B) of Section 204(a)(1), that amount is automatically reimbursed to the beneficiary. On the other hand, if the threshold inquiry reveals a payment of "more than the correct amount," then subsection (A) provides that the Secretary shall seek adjustment or recovery. However, Section 204(b) qualifies the Secretary's authority to recoup past overpayments as follows (42 U.S.C. 404(b)):

> In any case in which more than the correct amount of payment has been made, there shall be no adjustment of payments to, or recovery by the United States from, any person who is without fault if such adjustment or recovery would defeat the purpose of this subchapter or would be against equity and good conscience.

The Title XVI provision contains a similar qualification (see p. 5, *supra*).

It is the language of these provisions for a waiver of recovery of overpayments that the court of appeals identified as being in conflict with the netting regulations. In particular, the court found that the netting procedure is a

method of securing a "recovery" of overpayments, and thus is inconsistent with the language directing that the beneficiary be given an opportunity to seek a waiver before any attempt is made to effectuate an "adjustment or recovery" of overpaid benefits. Pet. App. 10a-11a, 12a. It is to this contention that we now turn.

2. If, as respondents contend and the court of appeals held, netting is a form of "adjustment or recovery" under Section 204(a)(1) or 1631(b)(1)(A), then it follows that no netting may take place until the Secretary has afforded the beneficiary the opportunity to request waiver of the entire amount of the excess monthly payments considered separately. The language and history of the waiver provisions clearly indicate, however, that the terms "adjustment or recovery" do not have this inclusive meaning. When these provisions are considered together, and read in light of Congress's reason for providing for forgiveness of the beneficiary's obligation to repay, it is clear that Congress did not intend to bar the Secretary's practice of netting all past errors together.

a. The language of the correction and waiver provisions themselves makes clear that the words "adjustment or recovery" were intended to refer only to (1) the withholding of future program benefits ("adjustment") or (2) a demand for payment from assets in the possession of the recipient or his estate ("recovery"). Under Section 204(a)(1) of Title II, the Secretary is directed to make "proper adjustment or recovery" of excess disbursements by "decreas[ing] any payment under this subchapter to which such overpaid person * * * is entitled,"or by "requir[ing] * * * [a] refund." "Adjustment" therefore clearly corresponds to future withholding, and "recovery" corresponds to seeking a refund. Similarly, under Section 1631(b)(1)(A) of Title XVI, "proper adjustment or

recovery" is to be made by means of "appropriate adjustments in future payments" or "recovery" from the individual or his estate.

Plainly, the Title XVI definition of "adjustment" contains no ambiguity. In that provision, Congress expressly described an "adjustment" more fully as "an appropriate adjustment[] in *future* payments." Although the Title II provision uses a slightly different formulation—authorizing "adjustment" by means of a reduction in "any payment under this subchapter" to which the beneficiary is entitled—that phrase also strongly suggests that the term "adjustment" refers to the withholding of future benefits.

On the other hand, Title II uses the word "recovery" in a manner incompatible with the suggestion that this term was intended to include administrative offsets. Section 204(a)(1)(A) describes a "recovery" more fully as "requir[ing] such overpaid person or his estate to *refund* the amount in excess of the correct amount * * *." Congress's direction to require a "refund" from "such overpaid person or his estate" is not the sort of language that would naturally be used to refer to methods of recovering overpayments by administrative offset. Clearly, what was contemplated was a demand for repayment of monies in the possession of the beneficiary of his estate—a collection action. Although the corresponding Title XVI provision, Section 1631(b)(1)(A), does not expressly define "recovery" as a refund, its overall structure, and the fact that it was modelled so closely on the parallel Title II provision, indicates that the two Sections should be read *in para materia*.

In sum, there is nothing in the choice of language in either Title to indicate that Congress understood either the term "adjustment" or the term "recovery" to refer to an offset against past underpayments. Indeed, because the term "adjustment" plainly refers to a reduction in future social

security benefits, and the term "recovery" so obviously refers to the collection of money by affirmative demand for payment, it is only these two methods of recouping past overpayments that cannot proceed without consideration of waiver.

b. An examination of the history of the payment error provisions under both Titles reinforces the inferences drawn from the statutory text. As originally enacted, the Social Security Act of 1935 authorized the SSA to correct payment errors by two methods. First, both underpayments and overpayments could be corrected in certain circumstances after the death of a beneficiary by a lump-sum payment to the beneficiary's estate, or by a demand for repayment from the estate. See Social Security Act, ch. 531, §§ 203(c), 206, 49 Stat. 624.[9]

Second, Section 202(c) provided

> If the [Social Security] Board finds at any time that more or less than the correct amount has theretofore

[9] Section 203(c) of the 1935 Act (49 Stat. 624) provided, in pertinent part:

> If the [Social Security] Board finds that the total amount paid to a qualified individual under an old-age benefit during his life was less than the correct amount to which he was entitled under section 202 * * * then there shall be paid to his estate a sum equal to the amount, if any, by which the correct amount of the old-age benefit exceeds the amount which was so paid to him during his life.

Section 206 of the 1935 Act (49 Stat. 624) provided, in pertinent part:

> If the [Social Security] Board finds that the total amount paid to a qualified individual under an old-age benefit during his life was more than the correct amount to which he was entitled under section 202 * * * then upon his death there shall be repaid to the United States by his estate the amount, if any, by which such total amount paid to him during his life exceeds * * * the correct amount to which he was entitled under section 202.

> been paid to any individual under this section, then, under regulations made by the Board, proper adjustments shall be made in connection with subsequent payments under this section to the same individual.

Several features of these original provisions are worth noting. In authorizing either a lump-sum payment to, or recoupment from, the estate of the beneficiary, the 1935 Act applied only if the Social Security Board found that "the *total* amount paid to a qualified individual under an old-age benefit during his life" was less or more than "the *correct* amount" (§§ 203(c), 206, 49 Stat. 624 (emphasis supplied)). The amount to be paid to or collected from the recipient's estate was thus calculated by subtracting the "correct amount" of benefits the recipient should have received from the "*total* amount paid." In expressly defining payment errors in this fashion, Congress took for granted that overpayments that were made in some months would be combined with underpayments in others. In short, in formulating one original progenitor of the present overpayment provision, Congress contemplated that all types of errors made during the beneficiary's lifetime would be added together, or "netted," in calculating the amount owed to the government. In 1935, Congress surely did not understand the process by which excess payments were *recovered* to have anything to do with the offset of past excesses and shortfalls necessary to deciding whether the provision applied in the first instance.

This conclusion is buttressed by the language of Section 202(c), in which Congress authorized the Board to determine whether "more or less" than the correct amount had been paid, and to make "adjustments * * * in connection with subsequent payments under this section to the same individual." This provision reveals that, when the original Act was promulgated, Congress understood the term "ad-

justment" to refer to increases or decreases that would be made in the amount of *subsequent* benefit payments. There is no indication that the term 'adjustment" referred to offsets of past payments against each other.

The subsequent history of the Act indicates that Congress's understanding of the pertinent terms did not change throughout several revisions of the Title II provision, and that it informed the formulation of the payment correction provision under Title XVI. The basic framework for payment error correction established under the 1935 Act was preserved in subsequent amendments. In 1939, the repayment provision amendment, Section 204(a), expressly reiterated the authorization for correcting excess or deficient payments by "proper adjustment," and again made explicit that this was to be accomplished by "increasing or decreasing *subsequent payments* to which such individual is entitled" (emphasis supplied). See Social Security Amendments of 1939, ch. 666, 53 Stat. 1368.[10] By defining an "adjustment" to correct an over

[10] The version of Section 204(a) and (b) enacted in 1939 reads as follows

> (a) Whenever an error has been made with respect to payments to an individual under this title (including payments made prior to January 1, 1940), proper adjustment shall be made, under regulations prescribed by the Board, by increasing or decreasing subsequent payments to which such individual is entitled. If such individual dies before such adjustment has been completed adjustment shall be made by increasing or decreasing subsequent benefits payable with respect to the wages which were the basis of benefits of such deceased individual.
>
> (b) There shall be no adjustment or recovery by the United States in any case where incorrect payment has been made to an individual who is without fault (including payments made prior to January 1, 1940), and where adjustment or recovery would defeat the purpose of this title or would be against equity and good conscience.

For reasons that are unexplained, the 1939 amendments appear to have deleted the sections of the 1935 Act providing for payments to or

payment as a deduction from "subsequent payments," Congress once again plainly indicated that the term "adjustment" referred only to the withholding of future benefits, not to the process of offsetting past overpayments against underpayments.

The provisions for payment correction were modified in another important respect. In order to alleviate the possible hardship that the withholding of future benefits to correct overpayments might create, Congress in 1939 also added Section 204(b) to allow a waiver in appropriate circumstances. In so doing, Congress introduced the critical phrase "adjustment or recovery" into the statute. Since the only two methods for correcting payment errors that Congress had recognized up to and including that time were increasing or decreasing subsequent payments to the beneficiary and a lump-sum payment to, or a demand for payment from, the recipient's estate, "adjustment" clearly referred to the first method, and "recovery" to the second.[11] Hence, under Section 204(b), it was only these

recovery from the estate of the beneficiary following death. However, the legislative history implies that Congress contemplated the continued use of legal action against the beneficiary's estate, as well as adjustment of future benefits during life, by explaining that the new Section 204(b) "waives any right of the United States to recover by legal action or otherwise" if recoupment would be inequitable. See S. Rep. No. 734, 76th Cong., 1st Sess. 51 (1939); H.R. Rep. No. 728, 76th Cong., 1st Sess. 42 (1939), and note 11, *infra*. In any event, the language authorizing recovery from the estate of the beneficiary reappeared in the 1967 version of the payment correction provisions. See p. 23, *infra*.

[11] The meaning Congress attached to these terms was confirmed by the Senate and House Reports, which explained that Section 204(b) was intended to "waive[] any right of the United States to recover by legal action or otherwise in any case of incorrect payment" to individuals without fault if recoupment would be inequitable. See note 10, *supra*, citing Senate and House Reports.

procedures that SSA could not carry out without first considering waiver.

In 1967, Congress amended Section 204 again, incorporating the present language. See Pub. L. No. 90-248, §§ 152, 153(a), 81 Stat. 860, 861. The revised provision expanded the government's power to collect erroneous overpayments during the beneficiary's lifetime. See S. Rep. No. 744, 90th Cong., 1st Sess. 257 (1967). The prior version, by authorizing only one method of recouping overpayments during the recipient's lifetime—the withholding of future benefits paid to the individual himself—had created a loophole in cases where the recipient was still alive but no longer receiving benefits. It also failed specifically to authorize collection from other individuals receiving benefits on the earnings record of an overpaid beneficiary who was still alive. *Ibid.*

The new provision therefore added another method for recovery of excess payments during a beneficiary's lifetime—a demand for a "refund"—and also expanded the category of individuals from whom recovery could be obtained. As explained in the Senate Report, "new subsection (a) provides that where a person is paid more than the correct amount, the overpayment shall be adjusted, or recovered * * * by requiring the overpaid person or his estate to make a refund, or by decreasing any social security benefits payable to the overpaid person or to any other person on the earnings record that served as the basis of the benefit payments to the overpaid person." S. Rep. No. 744, *supra*, at 257; see also *id.* at 94 ("Under the bill the Secretary would have authority in any case where there has been an overpayment of cash benefits, to recover the overpayment by requiring a refund or by withholding the cash social security benefits [to anyone] getting benefits on the same earnings record, whether or not the overpaid person is alive."). By enumerating the methods by which overpayments could be "adjusted, or recovered,"—that is, by "requiring a refund" or by "decreasing any social security benefits" that had yet to be paid—the Senate Report again makes plain that those terms were confined to a refund of assets in the recipient's possession or a reduction in future benefit payments.[12]

In sum, there is no suggestion in the legislative materials that either of the terms used in the waiver of recoupment sections was intended to encompass reductions of overpayments by offsets against underpayments. On the contrary, Congress's choice of language, the logic of the statute's evolution, and the remarks accompanying the successive revisions in the provisions all point to one conclusion: that in providing an opportunity to waive "adjustment or recovery," Congress did not intend to place limits on the practice of offsetting past overpayments and underpayments through netting.

3. Even if it were possible to regard the statutory language and legislative history as leaving unresolved the correct interpretation of the terms "adjustment" and "recovery," the court of appeals should not have substituted its own preferred construction for that of the agency charged with administering the statute. This Court has made clear that the "view of the agency charged with administering [a] statute is entitled to considerable deference; and to sustain it, we need not find that it is the only permissible construction that [the agency] might have adopted but only that [the agency's] understanding * * * is

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[12] The history of the Title XVI provision, which has been only slightly revised since its enactment as part of the amendments creating the SSI program, is less revealing. However, the legislative remarks accompanying its passage contain not the slightest suggestion that Congress incorporated the terms "adjustment or recovery"—which were borrowed directly from the parallel and previously enacted Title II provisions—with any different understanding of their meaning.

a sufficiently rational one * * *." *Young* v. *Community Nutrition Institute*, 476 U.S. at 981 (citing *Chemical Manufacturers Ass'n* v. *NRDC, Inc.*, 470 U.S. 116, 125 (1985)).

There can be no doubt that the Secretary's netting regulations are, at a minimum, a "permissible" construction of the statute sufficient to warrant deference. First, even if the standard interpretive materials fall short of demonstrating conclusively that the terms "adjustment" and "recovery" were intended to refer only to withholding of future benefits and demands for refunds, they certainly contain nothing to rule out an interpretation of those terms compatible with the Secretary's netting procedure. At the least, there is no "clear meaning of [the] statute, as revealed by its language, purpose, and history" (*Southeastern Community College* v. *Davis*, 442 U.S. 397, 411 (1979)) that leads inexorably to the conclusion that the terms "adjustment" and "recovery" must refer to offset of past payments as well as to the measures enumerated in the language of the statutes.

In addition, the operative terms that define the threshold inquiry—whether there has in fact been a past payment error—clearly permit the Secretary to use the netting method described in the regulations. Section 204(a) states that "[w]henever the Secretary finds that more or less than the correct amount of payment has been made" to a beneficiary, proper adjustment or recovery shall be made by the Secretary as prescribed. Neither the statute nor the legislative history addresses the meaning of "more or less." These terms are not defined in Section 204(a) or 1631(b)(1), or in any other provision of the statute. The statute is likewise silent concerning the period over which past errors can be taken into account in deciding whether more or less than the correct amount has been paid. As we

have pointed out above, Sections 204(a) and 1631(b)(1), unlike certain other provisions of Title II, contain no express requirement that a determination of payment be made "for each month." Indeed, the court of appeals acknowledged that the statute did not indicate explicitly "over what past time period there must be a determination of payment errors" (Pet. App. 11a).

The netting regulations are likewise valid as a permissible construction of the phrase "correct amount of payment." The Secretary has chosen to construe the phrase "correct amount of payment' to mean the amount of benefits to which the claimant is entitled, overall, up to the time the Secretary reviews the payments. It is not only plausible, but sensible, to read Section 204(a) as permitting the Secretary to decide if the total amount the beneficiary received during the entire period preceding the present represents "more * * * than the correct amount of payment" that is currently due.

Since Congress chose to leave undefined the terms "more or less" and "correct amount of payment," and placed no restrictions on the time period over which the Secretary could take past errors into account, deference to the Secretary's construction is in order. See *Chevron*, 467 U.S. at 843; see also *Webb* v. *Bowen*, 851 F.2d 190, 192 (8th Cir. 1988).

4. The court of appeals, following the dissenting judge in *Lugo* v. *Schweiker, supra,* suggested that the Secretary's regulations were at odds with this Court's decision in *Califano* v. *Yamasaki*, 442 U.S. 682 (1979). See Pet. App. 10a-11a. *Yamasaki*, however, was concerned only with the narrow question whether either the statute or due process requires that a beneficiary be afforded an opportunity for an oral hearing when the Secretary attempts to make an "adjustment or recovery" of past overpayments. No issue

was presented in *Yamasaki* as to the proper interpretation of the phrase "adjustment or recovery."

Indeed, as the majority pointed out in *Lugo*, *Yamasaki* confirms the reasonableness of the Secretary's reading of the statute. In *Yamasaki*, 442 U.S. at 693, 695-697, the Court indicated that disputes concerning the *amount* of an error as determined under Section 204(a)[13] require less stringent procedures than determinations as to whether there should be a waiver of recovery under Section 204(b). While the Court "required a hearing for determination of imprecise [Section 204(b] standards such as 'fault,' it noted that disputes may arise over the [Section 204(a)] calculation of overpayment but there need be no hearing to resolve them." *Lugo* v. *Schweiker*, 776 F.2d at 1149. The *Yamasaki* Court thus made clear than an oral hearing is *not* a necessary prerequisite to a determination whether "more or less" than the correct amount has been paid. In holding that the Secretary's method for ascertaining error deprives recipients of a hearing to which they are entitled, the Tenth Circuit's ruling interposes a procedural requirement that this Court has determined does not apply.

At bottom, the assertion that *Yamasaki* is incompatible with the use of the netting methodology rests entirely on an assumption that the offsetting of past excess payments against past shortfalls is a form of "adjustment or recovery." As the previous discussion demonstrates (see pp. 22-29, *supra*), that assumption is wrong. In any event, the *Yamasaki* Court did not address—and perforce did

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[13] The regulations permit beneficiaries to question the accuracy of the *amount* of an underpayment or an overpayment of which they have been notified by requesting reconsideration of the Secretary's determination. See 20 C.F.R. 404.907 (Title II); 20 C.F.R. 416.1407 (Title XVI). Beneficiaries notified of overpayments may request reconsideration or waiver, or both.

not impose any restrictions on—the method the Secretary could use to compute a past error. Accordingly, there can be no claim that the netting procedure—which was adopted more than five years before this Court's decision in *Yamasaki* (see p. 17, *supra*)—represents an effort by the Secretary to make an "end run" around this Court's decision. See *Lugo* v. *Schweiker*, 776 F.2d at 1156 (Gibbons, J. dissenting).

C. The Secretary's Regulations are a Reasonable Implementation of the Statute and are Faithful to Congress's Evident Purpose in Providing for a Waiver of any Adjustment or Recovery of Overpayments.

When considered in light of the equitable goals of the waiver of recoupment scheme and the underlying purpose of the benefits programs, the Secretary's netting practice is entirely reasonable. The overall objective of the Social Security system is "the protection of its beneficiaries from some of the hardships of existence." *United States* v. *Silk*, 331 U.S. 704, 711 (1947). The commentary accompanying the passage of the original 1935 Social Security Act reveals that the income and retirement insurance system was created to guarantee a regular source of income sufficient to maintain a minimum standard of living, and to protect against "dependency." See H.R. Rep. No. 615, 74th Cong., 1st Sess. 2, 4 (1935). See also *Report of the Committee on Economic Security*, H.R. Doc. No. 81, 74th Cong., 1st Sess. 2 (1935); *Message of the President Recommending Legislation on Economic Security*, H.R. Doc. No. 81, 74th Cong., 1st Sess. 1 (1935). Similarly, in enacting Title XVI, Congress repeatedly stressed that the principal goal of the SSI program was to "set a Federal guaranteed minimum income level for aged, blind, and disabled persons" who were incapable of supporting themselves. S. Rep. No. 1230, 92d Cong., 2d Sess. 12

(1972); see also H.R. Rep. No. 231, 92d Cong., 1st Sess. 147, 155 (1971); *Schweiker* v. *Wilson*, 450 U.S. 221, 223 (1981).

Congress's motive in permitting selective waiver of the beneficiary's obligation to repay must be understood in light of these fundamental objectives. The evident purpose of the waiver provisions is to ensure that beneficiaries do not incur financial obligations that deprive them of the resources or income needed to maintain a minimum standard of living. That goal is fully accomplished under the Secretary's regulations. Under the netting procedure, the Secretary may *never* reduce future benefits or take steps to collect a refund without first affording the beneficiary the opportunity to seek a waiver, and to demonstrate that repayment would be inequitable or would defeat the statute's purpose. Thus, the netting practice effectively guarantees that a beneficiary who is without fault will not be forced to live on less than a minimally adequately income.[14]

On the other hand, the Tenth Circuit's mandated system of separate accounting is unwieldly and unreasonable. A system of separate accounting would require the Secretary automatically to reimburse all underpayments, whether or not the beneficiary has already been repaid in the form of mistaken overpayments. In many instances, this will result

[14] See 20 C.F.R. 404.508(a) (adjustment or recovery is deemed to "[d]efeat the purpose" of Title II if it would "deprive a person of income required for ordinary and necessary living expenses. This depends upon whether the person has an income or financial resources sufficient for more than ordinary and necessary needs, or is dependent upon all of his current benefits for such needs"); 20 C.F.R. 416.553 (adjustment or recovery is considered to "[d]efeat the purpose" of Title XVI if "the individual's income and resources are needed for ordinary and necessary living expenses").

in making additional payments to beneficiaries who have already been "paid up," because they have received the entire amount due under the statute up to and including the time the Secretary becomes aware of payment errors. And in some instances, the Secretary would be required to "reimburse" an individual for underpayments under one program, even though the beneficiary has already been overpaid for the *same* period under the same or a different program.[15] In effect, the Tenth Circuit's system of separate accounting would turn a method for correcting errors into a method for making errors.

If forced to apply the Tenth Circuit's rule, the Secretary would also exacerbate many pre-existing disparities between the amount paid and the amount actually due. In all cases involving mixed payment errors, the Secretary would automatically be required to reimburse beneficiaries for any underpayments, even if they had previously received incorrect overpayments that were *solely the fault of the beneficiary*. Congress surely could not have intended this

[15] For example, intervenor Berline Wise received underpayments as well as overpayments during an overlapping period. Because she had failed to report outside earnings, Ms. Wise received almost $25,000 in disability benefits to which she was not entitled from August 1976 to May 1983. However, she had not claimed $10,500 in retirement benefits to which she was entitled for the period September 1980 to December 1983. In December 1983, the Secretary determined that errors had been made, applied the netting method, and informed Ms. Wise that she owed a net overpayment of $14,500. Gov't C.A. Br. 9-10.

As the result of the decision below reversing the Secretary's netting of the errors under both programs and granting relief to named plaintiff-intervenors, Ms. Wise was paid the full amount of retirement benefits due in the pertinent period, even though she had already been paid disability benefits to which she was *not* entitled for a significant part of the period in question. See also *Everhart* v. *Bowen*, 694 F. Supp. 1518, 1523 (D. Colo. 1988) (reversing on other grounds the Appeals Council's decision upholding the Secretary's netting determination in Ms. Wise's case).

anomalous result. As we have seen, Congress's purpose in enacting the waiver provisions was to prevent the Secretary from deliberately inflicting present and future hardship on program beneficiaries, not to mandate the *over*compensation of beneficiaries regardless of the circumstances surrounding the error. Nor can it be thought that Congress's purpose in enacting the waiver provisions was to undermine the Secretary's attempt to make payments that reflect the actual amount of benefits to which an individual is entitled as precisely as possible.

In addition to imposing on the Secretary the paradoxical, counterintuitive requirement to pay money to beneficiaries who have already been paid too much, the Tenth Circuit's rule burdens SSA with a needless and expensive multiplication of procedural obligations. The Secretary would be required to calculate at least two error amounts in all cases in which netting would result in a single amount. Because the government would be entitled to no credit for past overpayments in computing past underpayments (which must be automatically reimbursed), the total amount the Secretary would be required to pay out would substantially increase.[16] Those who

[16] Moreover, the logic behind the dissent in *Lugo* would appear to require separate treatment for each monthly error. See pp. 19-20, *supra* (discussing Judge Gibbons' reliance on the purported "basic statutory [monthly] accounting period"). This would result in a cumbersome procedure whereby the Secretary would reimburse *each* underpayment on a month by month basis, and afford each beneficiary a discrete opportunity to request waiver for *each* monthly overpayment. Such a strict monthly accounting system would undoubtedly result in even larger total amounts of waived overpayments. Under Title XVI, for example, recoupement is waived if the cost of recovery exceeds the overpayment amount. See 20 C.F.R. 416.555. Obviously, overpayments that are considered on a monthly basis will more frequently qualify for waiver under this provision than overpayments that represent the sum of errors over several months.

would otherwise be overpaid after netting would now be entitled to reimbursement; those who would be underpaid after netting would now be entitled to even larger amounts of reimbursement than they would have received if their underpayments had been offset against overpayments.[17] Whether or not these sums would be recovered eventually in the form of recoupment of overpayments, the Secretary would be obliged to set aside considerable fiscal reserves to cover the larger and more numerous reimbursement checks. And even if a significant portion of the additional amounts that are reimbursed are eventually recovered by the Secretary, the government would have lost the interest earned on these funds during the period from payment to recovery.

[17] For example, a beneficiary with $1000 total deficiencies and $500 total overpayments during a past period would be entitled to reimbursement of $500 after netting. Under a separate accounting system, he would be entitled to reimbursement of $1000 – $500 more than he would have received under the netting regulations. This extra $500 – which previously would have been netted against his underpayment – is now considered an overpayment that the Secretary must recover separately.

A beneficiary found to have a net past overpayment of $500 based on $500 total past underpayments and $1000 past overpayments would be entitled to no reimbursement under netting, but would owe the SSA $500. Under the system of separate accounting, the recipient would be immediately entitled to $500 in reimbursement, and the SSA would be forced to recover a larger amount – $1000 – representing overpayments considered separately. In sum, the disallowance of netting would affect the distribution of funds in three ways: 1) the Secretary would disburse a larger amount of money to all beneficiaries with past "mixed" errors 2); the Secretary would have to make efforts to collect overpayments from a new class of beneficiaries not previously considered overpaid; and 3) the total amount outstanding as uncollected overpayments, and the average amount the Secretary must attempt to collect from beneficiaries with "mixed" errors who were previously considered overpaid, will increase.

Even more perversely, if netting is foreclosed, many thousands of individuals each year who are currently found to be underpaid after netting (because their total underpayments exceed their overpayments) will be converted into beneficiaries with outstanding overpayments (because their underpayments will be automatically paid, leaving only overpayments). The multi-step task of processing this large new pool of overpaid beneficiaries will demand considerable administrative effort. Even if an overpaid beneficiary does not request waiver, SSA must still notify recipients of their right to request a waiver, answer inquiries and requests for explanations, review and resolve requests for reconsideration as to the fact or amount of overpayment, complete overpayment recovery questionnaires, establish payback or future benefit adjustment schedules, monitor or suspend repayment on the basis of pending appeals, and institute collection actions. See Program Operations Manual System (POMS) GN 02201.004 *et seq.*, GN 02210.150 *et seq.* (1989) (describing procedures for processing and recovering overpayments). In addition, according to HHS, the payment of large sums that must affirmatively be recouped as overpayments will result in a significant and permanent *net* loss of funds from the benefits pool.[18] And, even if overpaid beneficiaries continue to request waiver at the present rate,[19] the absolute number of recipients who are entitled

[18] According to the agency's most recent estimate, about 11 percent of excess benefits owed by beneficiaries under Title II are never collected (due to terminated collection efforts or a grant of waiver).

[19] According to HHS' most recent estimate, about six percent of Title II RSI beneficiaries who are overpaid request a waiver. Although exact figures are not available, the rate of requests among individuals receiving disability benefits under both Titles is estimated to be higher, probably because these beneficiaries are more likely to depend exclusively on their benefits, especially under the SSI program, and thus are particularly unlikely to be in the financial position to repay the government.

In any event, the invalidation of netting may well generate a higher percentage of waiver requests by creating a greater incentive to seek forgiveness. As pointed out above, see note 17, *supra*, separate accounting will lead to an increase in the amount owed to the government by those beneficiaries whose past overpayments would otherwise have been reduced by offset. Because, for this group, the obligation to repay will become more onerous than it would have been after netting, it is reasonable to expect that these beneficiaries will more frequently request relief from the obligation to repay.

to an elaborate case-by-case-consideration of their requests for forgiveness will increase dramatically, placing a significant new burden on "an already overburdened agency." *Heckler* v. *Campbell*, 461 U.S. 458, 468 (1983).[20]

[20] If waiver is requested, the agency must inquire comprehensively into the beneficiary's personal circumstances and the reasons for the mistaken payment in order to assess "fault" and to determine if recovery would "defeat the purpose" of the statute or be against "equity and good conscience." The multiple criteria for a finding that a beneficiary is without fault are set forth at 20 C.F.R. 404.507, 404.510, 404.510a, 404.511 (Title II) and 416.552 (Title XVI). These regulations provide that a beneficiary is "at fault" in receiving or retaining an overpayment if he knew or should have known that the payment was incorrect or was based on incomplete or inaccurate information. That determination involves a sophisticated exercise of administrative judgment based on a host of individualized factors, including the credibility of the beneficiary. See, *e.g.*, 20 C.F.R. 404.507 (The administrator "will consider all pertinent circumstances, including • • • age, intelligence, education, and physical and mental condition"); 20 C.F.R. 416.552 ("Whether an individual is 'without fault' depends on all the pertinent circumstances surrounding the overpayment in the particular case").

With respect to the "equity and good conscience" exemption, the regulations require SSA to investigate whether the recipient "because of a notice that such payment would be made or by reason of the incorrect payment, relinquished a valuable right • • • or changed his or

The procedures for processing overpayments and evaluating requests for waiver serve an important and appropriate function in protecting subsistence-level beneficiaries against the loss of future benefits due to past mistakes that are no fault of their own. But, as the Court observed in *Mathews* v. *Eldridge*, 424 U.S. 319, 348 (1976), government funds spent on superfluous procedures "in the end come out of the pockets of the deserving since resources available for any particular program of social welfare are not unlimited." The Secretary has a fiduciary responsibility to all present and future participants in the Social Security programs to guard against the pointless and unnecessary expenditure of the funds allotted to these programs. He has a corresponding interest in averting the imposition of cumbersome and redundant procedural requirements for the recovery of Social Security overpayments. It is perverse to adopt a rule that in effect requires that beneficiaries be deliberately overpaid or paid twice for the same period and then subject to elaborate procedures before the Secretary may attempt recoupment. Congress did not contemplate such a result, and the Social Security Act does not require it. The Secretary's sensible and longstanding regulations should be sustained.

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her position for the worse." 20 C.F.R. 404.509; see also 20 C.F.R. 404.512, 416.554. A "[d]efeat the purpose" determination necessitates a comprehensive investigation of the beneficiary's financial circumstances to ascertain if recovery would deprive an individual of "income required for ordinary and necessary living expenses." 20 C.F.R. 404.508(a) (Title II), 416.553 (Title XVI). Finally, Title XVI requires the administrator to decide whether the amount involved is too small to justify recovery by comparing the projected recoupment amount to the "administrative cost of handling" an overpayment case. See 20 C.F.R. 416.555.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX

Social Security Act, §§ 204(a)(1), 204(b), 42 U.S.C. 404(a)(1), 404(b) (Supp. IV 1986):

§ 404. Overpayments and underpayments

(a) Procedure for adjustment or recovery

(1) Whenever the Secretary finds that more or less than the correct amount of payment has been made to any person under this subchapter, proper adjustment or recovery shall be made, under regulations prescribed by the Secretary, as follows:

(A) With respect to payment to a person of more than the correct amount, the Secretary shall decrease any payment under this subchapter to which such overpaid person is entitled, or shall require such overpaid person or his estate to refund the amount in excess of the correct amount, or shall decrease any payment under this subchapter payable to his estate or to any other person on the basis of the wages and self-employment income which were the basis of the payments to such overpaid person, or shall apply any combination of the foregoing. A payment made under this subchapter on the basis of an erroneous report of death by the Department of Defense of an individual in the line of duty while he is a member of the uniformed services (as defined in section 410(m) of this title) on active duty (as defined in section 410(*l*) of this title) shall not be considered an incorrect payment for any month prior to the month such Department notifies the Secretary that such individual is alive.

(B) With respect to payment to a person of less than the correct amount, the Secretary shall make payment of the balance of the amount due such un-

derpaid person, or, if such person dies before payments are completed or before negotiating one or more checks representing correct payments, disposition of the amount due shall be made in accordance with subsection (d) of this section.

* * * * *

(b) No recovery from persons without fault

In any case in which more than the correct amount of payment has been made, there shall be no adjustment of payments to, or recovery by the United States from, any person who is without fault if such adjustment or recovery would defeat the purpose of this subchapter or would be against equity and good conscience.

Social Security Act, § 1631(b)(1), 42 U.S.C. 1383(b)(1) (Supp. IV 1986):

(b) Overpayments and underpayments; adjustment, recovery, or payment of amounts by Secretary

(1)(A) Whenever the Secretary finds that more or less than the correct amount of benefits has been paid with respect to any individual, proper adjustment or recovery shall, subject to the succeeding provisions of this subsection, be made by appropriate adjustments in future payments to such individual or by recovery from such individual or his eligible spouse (or from the estate of either) or by payment to such individual or his eligible spouse, or, if such individual is deceased, by payment—

(i) to any surviving spouse of such individual, whether or not the individual's eligible spouse, if (within the meaning of the first sentence of section 402(i) of this title) such surviving husband or wife was living in the same household with the individual at the time of his death or within the 6 months immediately preceding the month of such death, or

(ii) if such individual was a disabled or blind child who was living with his parent or parents at the time of his death or within the 6 months immediately preceding the month of such death, to such parent or parents.

(B) The Secretary (i) shall make such provision as he finds appropriate in the case of payment of more than the correct amount of benefits with respect to an individual with a view to avoiding penalizing such individual or his eligible spouse who was without fault in connection with the overpayment, if adjustment or recovery on account of such overpayment in such case would defeat the purposes of this subchapter, or be against equity and good conscience, or (because of the small amount involved) impede efficient or effective administration of this subchapter, and (ii) shall in any event make the adjustment or recovery (in the case of payment of more than the correct amount of benefits), in the case of an individual or eligible spouse receiving benefit payments under this subchapter (including supplementary payments of the type described in section 1382e(a) of this title and payments pursuant to an agreement entered into under section 212(a) of Public Law 93-66), in amounts which in the aggregate do not exceed (for any month) the lesser of (I) the amount of his or their benefit under this subchapter for that month or (II) an amount equal to 10 percent of his or their income for that month (including such benefit but excluding any other income excluded pursuant to section 1382a(b) of this title), unless fraud, willful misrepresentation, or concealment of material information was involved on the part of the individual or spouse in connection with the overpayment, or unless the individual requests that such adjustment or recovery be made at a higher or lower rate and the Secretary determines that adjustment or recovery at such rate is

justified and appropriate. The availability (in the case of an individual who has been paid more than the correct amount of benefits) of procedures for adjustment or recovery at a limited rate under clause (ii) of the preceding sentence shall not, in and of itself, prevent or restrict the provision (in such case) of more substantial relief under clause (i) of such sentence.

20 C.F.R. 404.504:

Relation to provisions for reductions and increases.

The amount of an overpayment or underpayment is the difference between the amount paid to the beneficiary and the amount of the payment to which the beneficiary was actually entitled. Such payment, for example, would be equal to the difference between the amount of a benefit in fact paid to the beneficiary and the amount of such benefit as reduced under section 202(j)(1), 202(k)(3), 203(a), or 224(a), or as increased under section 202(d)(2), 202(m), or 215(f) and (g). In effecting an adjustment with respect to an overpayment, no amount can be considered as having been withheld from a particular benefit which is in excess of the amount of such benefit as so decreased.

20 C.F.R. 416.538:

Amount of underpayment or overpayment.

The amount of an underpayment or overpayment is the difference between the amount paid to a recipient and the amount of payment actually due such recipient for a given period. An overpayment or underpayment period begins with the first month for which there is a difference between the amount paid and the amount actually due for that month. The period ends with the month the initial determination of overpayment or underpayment is made. With respect to the period established, there can be no

underpayment to a recipient or his eligible spouse if more than the correct amount payable under title XVI of the Social Security Act has been paid (whether or not adjustment or recovery of any overpayment for that period has been waived under the provisions of §§ 416.550 through 416.555) a subsequent initial determination of overpayment will require no change with respect to a prior determination of overpayment or to the period relating to such determination to the extent that the basis of the prior overpayment remains the same. Where an apparent overpayment has been detected but determination of the overpayment has not been made (see § 416.558(a)), a determination and payment of an underpayment which is otherwise due cannot be delayed unless a determination with respect to the apparent overpayment can be made before the close of the month following the month in which the underpaid amount was discovered. Further, any underpayment amount apparently due the surviving eligible spouse on account of a deceased recipient is reduced by the amount of any outstanding penalty imposed against the benefits payable to such deceased recipient under section 1631(e) of the Act (see § 416.537(b)(2)).

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RESPONDENT'S

BRIEF

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QUESTION PRESENTED

Whether the Tenth Circuit Court of Appeals correctly found that Social Security regulations requiring the netting of overpayments against underpayments violate the Social Security Act's waiver procedures.

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STATEMENT

Title II of the Social Security Act established the Old Age, Survivors and Disability Insurance (OASDI) programs under which monthly benefits are paid to insured workers, their spouses, and their children when the worker is disabled, retired or deceased. 42 U.S.C. § 401 *et seq.* Title XVI provides for the Supplemental Security Income program (SSI), which pays monthly benefits to the needy disabled, aged, and blind. 42 U.S.C. § 1381 *et seq.*

Payment errors in these two programs are widespread.[1] These errors include both the payment of excess benefits, called overpayments, and the payment of less benefits than are due to a beneficiary, or underpayments.[2] An overpaid beneficiary is statutorily entitled to request a waiver of the overpayment if it can be proven that the overpayment was not his fault and repayment would defeat the purposes of the Social Security Act or be against equity and good conscience.[3] Recipients who do

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[1] Payment errors in the Title II program alone affect an average of 4.7 million beneficiaries each month. *Social Security: Payment Accuracy Rates are Overstated, United States General Accounting Office Report to the Chairmen, U.S. Senate Subcomm. on Labor, Health and Human Services, and Education, Comm. on Appropriations* 4 (Oct. 1987) (hereinafter GAO Report). The GAO Report found that one of every six cases was in error, for an average of five years. *Id.* at 5.

[2] If a recipient disagrees that an overpayment has occurred or disputes the amount of the overpayment or underpayment, he can appeal by filing a request for reconsideration. 20 C.F.R. § 404.907, § 416.1407.

[3] 42 U.S.C. § 404(b) (Title II); 42 U.S.C. § 1383(b)(1)(B) (Title XVI).

not request waiver or who are denied waiver[4] are subject to recoupment procedures by the Secretary. 42 U.S.C. § 404(a)(1)(A).[5]

This case involves a challenge to Social Security netting regulations which recover overpayments owed by elderly and disabled beneficiaries by offsetting their underpayments without affording them an opportunity to request waiver of recovery of the overpayments. As a result of this netting policy, blameless individuals with inadequate financial means are nevertheless forced to repay overpayments which otherwise would be subject to statutory waiver provisions.

All of the respondents have received both overpayments and underpayments. This fact places them in a worse position than beneficiaries who only have received overpayments. Those beneficiaries will always have an opportunity to seek waiver of recovery of the overpayments. The respondents, however, have been deprived of the right to seek prerecoupment waiver as a result of the netting regulations, 20 C.F.R. §§ 404.504 and 416.538.

The issue before the Court is whether these netting regulations violate the Social Security Act. The Tenth Circuit Court of Appeals held that they do.

Respondents generally accept the statement of the case by the Secretary of Health and Human Services (the Secretary) with the following additions.

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[4] The waiver regulations under Title II appear at 20 C.F.R. §§ 404.502a, 404.506 through 404.512. The Title XVI waiver regulations are at 20 C.F.R. §§ 416.550 through 416.555. The legal effect of a waiver of recovery is that the recipient is freed of any obligation to repay the amount of the overpayment covered by the waiver. 20 C.F.R. § 416.551.

[5] 42 U.S.C. § 1383 (b)(1)(A) (Title XVI); *see, e.g.*, 20 C.F.R. § 404.502, 20 C.F.R. § 416.570.

A. Facts Of Named Respondents

The five named respondents are all severely disabled or elderly Social Security or Supplemental Security Income (SSI) beneficiaries. Because of changing circumstances which affected their entitlement to and the amount of their benefits, the five respondents were overpaid benefits for some months and underpaid for other months. Each respondent had underpayments offset against overpayments without an opportunity to request waiver of repayment of the overpayments.

1. *Sandra and Thomas Everhart.* Sandra and Thomas Everhart were married in September 1984. Sandra is mentally retarded, epileptic and blind; Thomas is mentally disabled and suffers from a severe seizure disorder. Complaint, pp. 2, 3, 6; Answer, p. 1. Prior to their marriage, Sandra received Social Security disability benefits (Title II) and SSI (Title XVI); Thomas received only SSI. Complaint pp. 2-3; Answer p. 1. Although the Everharts reported their marriage and income from sheltered work to the Social Security Administration (SSA), monthly changes in income and delays in the adjustment of their benefits due to their marriage resulted in monthly overpayments and underpayments between August 1984 and January 1985. Gov't Br. 6 n.4. The Secretary claimed a netting period for those six months[6] and determined the Everharts had a net underpayment of $407 (Pet. App. 3a), and, therefore, the waiver statute did not apply to their overpayments.

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[6] The Secretary admitted in his answer that the netting period began in August 1984 and ended in December 1984. Answer, p. 3. However, before the Court of Appeals the Secretary suggested the netting period actually extended to January 1985. Government Court of Appeals Brief (Gov't C.A. Br.) 8 n.8.

2. *Myron Zenick*. Myron Zenick is a severely emotionally disabled man who began receiving Title II disability benefits in 1976. After some work activity between 1980 and 1982, Mr. Zenick was notified by the Secretary in September 1983 that his disability had ceased effective March 1980 and that he had been overpaid for benefits received since that date. Complaint, pp. 7-8; Answer, p. 4. Mr. Zenick reapplied for benefits instead of appealing the September 1983 determination. In January 1985, an Administrative Law Judge (ALJ) issued a decision finding Mr. Zenick disabled retroactive to March 1982. Complaint, p. 9; Answer, p. 1. This decision resulted in an underpayment owed to Mr. Zenick. *Id.*

Although Mr. Zenick was owed an underpayment of retroactive benefits from March 1982 through January 1985, the Secretary offset this underpayment against the previously determined overpayment[7] and paid a netted underpayment of $4,402 without allowing Mr. Zenick to prove that recovery of the overpayment would be against equity and good conscience or would defeat the purposes of the Act. Complaint, p. 9; Answer p. 1.

3. *Emil Zwiezen*. Intervenor Emil Zwiezen received a notice from the Secretary that he had been overpaid $9,483 in retirement benefits because of underestimated earnings. Zwiezen Complaint in Intervention, p. 2-3; Zwiezen Answer, p. 3. Mr. Zwiezen was also underpaid

[7] The Secretary conceded before the Court of Appeals that "the netting rules may not have been applied (or properly applied) in Zenick's case." Gov't C.A. Br. 9 n. 9. The Secretary indicated he was "currently re-examining Zenick's case." It is clear that underpayment and overpayment periods are completely separate in Mr. Zenick's case, and if this had been an SSI case, he should have been afforded waiver rights under the Secretary's "different period" netting policy, 20 C.F.R. § 416.543; *See infra* at pp. 6-7, 29-30.

$4,376, however, because of unpaid increases in his monthly benefit amount. *Id.* The Secretary netted these two amounts and determined that Mr. Zwiezen had received a net overpayment of $5,107. Pet. App. 4a. Even though the overpayments occurred between 1978 and 1981 and the underpayments occurred between November 1977 and April 1984, the Secretary established a netting period of seven years because the initial overpayment determination was not made until April 1984. *Everhart* v. *Bowen*, 694 F. Supp. 1518, 1519 (D. Colo. 1988).

The overpayment determination in Mr. Zwiezen's case was made at the same time he was notified of the underpayment. Mr. Zwiezen sought waiver of recovery of the overpayment, and an ALJ agreed. However, the Appeals Council reversed that decision, considering Mr. Zwiezen to be at fault in causing the overpayment.[8] Zwiezen Complaint, p. 2; Zwiezen Answer, p. 2. The Appeals Council applied the Secretary's netting methodology, stating that only the netted overpayment was subject to waiver rights. Zwiezen Complaint, p. 3; Zwiezen Answer, p.3.

4. *Berline Wise*. Intervenor Berline Wise was also subjected to a seven-year netting period. Mrs. Wise began receiving Social Security disability benefits in 1975 as a result of hypertension and severe obesity. Wise Transcript of Administrative Record (hereinafter Wise Tr.) 7, 90. Her benefits were formally terminated in late 1983, retroactive to August 1976 due to alleged work activity. Wise Tr. 90, 93. In August 1983, Mrs. Wise applied for retirement benefits and was later found eligible retroactive to September 1980, thereby resulting in an underpay-

[8] This determination was later reversed by the District Court on other grounds. *Everhart* v. *Bowen*, 694 F. Supp. 1518 (D. Colo. 1988). *See infra* note 9.

ment owed to her. Wise Tr. 98. Mrs. Wise was notified on February 2, 1984 that she had been overpaid because of retroactive cessation of disability back to 1976. *Id.*

In the February 1984 notice, the Secretary formally determined that Mrs. Wise had received a net overpayment of $14,984. *Id.* This resulted from an overpayment of $25,171 from August 1976 through May 1983 and an underpayment of $10,187 from September 1980 through December 1983. Wise Complaint in Intervention, p. 3; Wise Answer, p. 1.

The Secretary afforded Mrs. Wise an opportunity to seek waiver of recovery of only the net overpayment, but Mrs. Wise challenged the validity of the netting regulations and sought waiver of the entire overpayment. An ALJ agreed, but seven months later the Appeals Council reopened her case and "upheld the net overpayment figure and the application of the waiver procedure to that amount." Pet. App. 4a. The Appeals Council also found that Mrs. Wise was at fault in receiving the overpayment and did not qualify for waiver of recoupment.[9] Wise Complaint, p. 3; Wise Answer, p. 1.

B. Statutory And Regulatory Scheme

The Secretary's description of the relevant regulations is generally accurate, but contains four significant omissions. The Secretary fails to acknowledge that there is a Title XVI netting regulation which provides some beneficiaries the prerecoupment waiver rights that the respondents seek. 20 C.F.R. § 416.543. The only distinction between the two SSI netting regulations, 20 C.F.R. § 416.538 and § 416.543, is the Secretary's determination of the "netting period." If the overpayments and underpayments occur within the same netting period, then section 416.538 applies, and no waiver rights are afforded. If the payment errors occur in different netting periods, then pursuant to section 416.543, prerecoupment waiver rights are afforded. This distinction is further discussed at Section II B, *infra*.

The Secretary also fails to mention another SSI regulation which provides the detailed notice that respondents believe is necessary. 20 C.F.R. § 416.558. Under this regulation SSI beneficiaries must receive notices which set forth the correct and incorrect amounts paid for each month in a period, their right to appeal the amounts of these determinations, and advice regarding their right to request waiver of adjustment or recovery.

The Secretary errs in insisting that the netting procedures are triggered when the Secretary "becomes aware of a mistaken payment." Gov't Br. 6. In fact, it is only when the Secretary makes an "initial determination"[10] of two mistaken payments in a so-called netting period, at least one an overpayment and another an underpayment, that the netting regulations come into play.[11]

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[9] This determination, like Mr. Zwiezen's, was later reversed by the district court on other grounds. *Everhart* v. *Bowen*, 694 F. Supp. 1518 (D. Colo. 1988). The Secretary filed a notice of appeal with respect to the district court's decision setting aside the Appeals Council's determinations with respect to Mr. Zwiezen and Mrs. Wise on jurisdictional grounds. However, that appeal was dismissed as interlocutory.

[10] An "initial determination" is a decision which gives a beneficiary the right to further administrative review. 20 C.F.R. § 404.900. *See also* 20 C.F.R. §§ 404.902 through 404.904, 416.1402 through 416.1404.

[11] The Secretary points to an early Claims Manual netting provision entitled "*Simultaneous* Underpayments and Overpayments." Gov't Br. 17 n.7 (emphasis supplied). The facts of the respondents illustrate, however, that these "mixed payment errors" (Gov't Br. 35) are hardly ever simultaneous and frequently occur many years apart.

Finally, the Secretary is only partially correct in describing the netting period as ending the month before he becomes aware of a mistaken payment. The Title XVI netting regulation states that the period ends the month *of* the "initial determination," while Social Security Ruling (SSR) 81-19a provides that under Title II the period ends the month *before* the month of initial determination. The significance of these statutory provisions is fully addressed below.

SUMMARY OF ARGUMENT

The Court of Appeals ruled correctly that the Secretary's regulations authorizing the offsetting (or netting) of overpayments and underpayments without first affording a beneficiary prerecoupment waiver rights were inconsistent with the plain language of the statutes.

Congress has not given the Secretary a free hand in correcting payment errors. At the same time that Congress directed the Secretary to correct overpayments and underpayments under 42 U.S.C. § 404(a) (Title II) and 42 U.S.C. § 1383(b)(1)(A) (Title XVI), Congress limited the Secretary's right to recover overpayments that were not the fault of the Social Security claimant and where recovery would be against equity and good conscience. 42 U.S.C. § 404(b); 42 U.S.C. § 1383(b)(1)(B).

The question for this Court to determine is whether netting is an adjustment or recovery and thereby subject to prerecoupment waiver procedures. Although the Secretary urges judicial deference to his netting regulations, the question of deference does not arise if Congress has not sanctioned this limitation on waiver rights.

As the Tenth Circuit recognized, the statutory scheme requires that prerecoupment waiver rights be afforded to

all claimants, including those who have received both overpayments and underpayments. When Congress first described "proper adjustment or recovery" in § 404(a) and in § 404(b) provided for "no adjustment . . . or recovery" (when waiver conditions are met), Congress intended that *all* payment adjustments authorized under subsection (a) be specifically limited under subsection (b). Accordingly, there is no authority for the Secretary to adjust or recover overpayments from underpayments prior to the application of § 404(b) waiver procedures. The netting regulations are invalid because, as the Tenth Circuit held, the Secretary "has effectively recovered overpayments without complying with the statutorily mandated waiver of recoupment procedures." Pet. App. 10a.

The Tenth Circuit based its decision in part on this Court's ruling in *Califano* v. *Yamasaki*, 442 U.S. 682, 697 (1979), that § 404(b) requires a prerecoupment oral hearing. As the Court held, "it is reasonable to infer that in this particular statute Congress did not intend to exalt recovery over waiver." 442 U.S. at 694 n.9.

The Secretary argues that waiver does not apply to his netting procedure because (1) waiver procedures are only required when there is "adjustment" or "recovery" and netting is not "adjustment" or "recovery;" and (2) netting is just a way of determining whether "more or less" than the correct amount has been paid. This argument is not consistent with the statutory scheme or the commonly understood meaning of the terms "adjustment" and "recovery." A careful analysis of the statutory language of § 404(a) and of § 1383(b)(1)(A) indicates that the phrase "adjustment or recovery" has been interpreted broadly and that Congress intended the phrase to refer to all collection techniques, including administrative offset.

The Secretary further maintains that he must use netting to determine whether "more or less" than the correct amount has been paid under the statute. He claims that this phrase authorizes the determination of a netting period. The respondents assert that the statute simply uses the phrase "more or less" to distinguish overpayments from underpayments, and it does not sanction the use of an ill-defined, open-ended netting period which is inconsistent with numerous Social Security monthly payment provisions. Alternatively, if the phrase "adjustment or recovery" is interpreted narrowly, as the Secretary maintains it should be, then netting is not one of the collection procedures set forth in Section 404(a) and is unauthorized.

In the event that the Court gives deference to the Secretary's interpretation, the netting regulations are invalid if they are arbitrary and capricious. The regulations are arbitrary because the netting period depends upon when the Secretary notifies a claimant of an overpayment or underpayment, rather than the date the Secretary discovers the erroneous payments. A review of the application of the Secretary's netting policy to the named respondents demonstrates this arbitrariness.

The Secretary's complaints of administrative inconvenience and expense are unfounded. The Secretary may still net overpayments and underpayments as long as he first affords claimants the right to seek waiver of the total amount of overpayments. New procedures would not need to be developed, because other regulations and internal policies are already in place to implement the Court of Appeals decision. As the Tenth Circuit concluded, "the Secretary would be under no greater burden to provide notices and hearings than that already imposed under the

statute and the Supreme Court's interpretation of the waiver provisions." Pet. App. 12a n.5.

ARGUMENT

I. THE SECRETARY'S REGULATIONS REQUIRING THE NETTING OF OVERPAYMENTS AND UNDERPAYMENTS UNDER TITLE II AND TITLE XVI ARE INCONSISTENT WITH STATUTORY PROVISIONS WHICH REQUIRE THAT CLAIMANTS BE AFFORDED PRERECOUPMENT WAIVER RIGHTS IN EVERY OVERPAYMENT CASE.

In assessing the validity of regulations the Court must consider "whether Congress has directly spoken to the precise question at issue." *Chevron U.S.A. Inc.* v. *NRDC, Inc.*, 467 U.S. 837, 842 (1984). In answering this question the Court must employ "traditional tools of statutory construction," including an examination of the words, structure, and history of the statutory provisions in question. *Id.* at 843 n.9.

Respondents assert that the "precise question at issue" is whether the statutes authorize netting without first affording claimants the right to request waiver of recovery of any overpayments. The Secretary contends that he has broad discretion under 42 U.S.C. § 404(a) and 42 U.S.C. § 1383(b)(1)(A) to determine whether a claimant has been overpaid or underpaid by utilizing the concept of a netting period. According to the Secretary, he must simply determine "if there has been a payment error, and if so, what kind and in what amount" and then determine "how, if at all, to rectify that error." Gov't Br. 19. As the following analysis demonstrates, Congress has always intended that overpaid claimants, including those also underpaid, have the right to seek waiver of recovery of those overpayments.

A. The Waiver Of Adjustment Or Recovery Is A Statutory Entitlement Which Protects Qualified Beneficiaries From Any Collection Activity.

Overpayments, which by definition involve the payment of excessive benefits, also carry with them the potential for hardship. The hardship can occur in later months when the Secretary attempts to recover overpayments from beneficiaries who cannot afford to pay them back and who were blameless in causing them. Congress recognized this problem early when it provided that any adjustment or recovery of the overpayment could be waived under certain circumstances. The mandatory language of the waiver provision unequivocally restricts the Secretary's ability to recoup any erroneous payments from individuals meeting the waiver criteria.

The Title II waiver statute, entitled "No Recovery From Persons Without Fault," provides:

> In any case in which more than the correct amount of payment has been made, there shall be no adjustment of payments to, or recovery by the United States from, any person who is without fault if such adjustment or recovery would defeat the purpose of this subchapter or would be against equity and good conscience.

42 U.S.C. § 404(b).[12]

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[12] The SSI statute similarly provides:

> The Secretary (i) shall make such provision as he finds appropriate in the case of payment of more than the correct amount of benefits with respect to an individual with a view to avoid penalizing such individual or his eligible spouse who was without fault in connection with the overpayment, if adjustment or recovery on account of such overpayment in such case would defeat the purposes of this subchapter or be against equity and good conscience, or (because of the small amount involved) impede efficient or effective administration of this subchapter. . . .

42 U.S.C. § 1383(b)(1)(B) (Supp. IV 1986).

Directly preceding this Title II waiver provision is Section 404(a), which defines the procedure for determining and correcting erroneous payments. 42 U.S.C. § 404(a)(1). Section 404(a), entitled "Procedure for Adjustment or Recovery," provides that the Secretary shall either make "proper adjustment or recovery" of overpayments or make payment of underpayments.[13] Although the juxtaposition of sections (a) and (b), the titles of the subheadings, and the repetition of the words "adjustment" and "recovery" clearly establish that § 404(b) limits the Secretary's overpayment recovery powers under § 404(a), the Secretary ignores basic rules of statutory construction in his interpretation of the interplay between these two sections.

This Court provided the clearest, most comprehensive analysis of the preeminence of waiver over recovery in its unanimous holding in *Califano* v. *Yamasaki*, 442 U.S. 682 (1979). In *Yamasaki*, as in the case at hand, the Secretary attempted to interfere with beneficiaries' waiver rights by recouping benefits prior to affording them an oral hearing on the issue of waiver. The Court found that a waiver determination must precede collection and that a hearing was necessary in order to make a determination regarding fault.[14]

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[13] The Title XVI erroneous payment statute provides in pertinent part:

> Whenever the Secretary finds that more or less than the correct amount of benefits has been paid . . . proper adjustment or recovery shall, subject to the succeeding provisions of this subsection, be made by appropriate adjustments in future payments . . . or by recovery from such individual . . . or by payment to such individual. . . .

42 U.S.C. § 1383(b)(1)(A) (Supp. IV 1986).

[14] Prior to this Court's decision in *Yamasaki* on statutory grounds, a number of courts had ruled that the failure to provide a pre-recovery

In analyzing the statute, the Court compared the language of the overpayment determination provision of the Social Security Act, § 204(a) (42 U.S.C. § 404(a)(1)), with the waiver provision, § 204(b) (42 U.S.C. § 404(b)), and concluded:

> On its face, § 204 requires that the Secretary make a pre-recoupment waiver decision, and that the decision, like that concerning the fact of the overpayment, be accurate. In the imperative voice, it says, "there shall be no adjustment of payments to, or recovery by the United States from, any person" who qualifies for waiver. *See Mattern* v. *Weinberger*, 519 F.2d, at 166, and n.32.

442 U.S. at 693-94 (footnotes omitted). The Court also found:

> Echoing this requirement, § 204(a) says that only "proper" adjustments or recoveries are to be made. The implication is that *a recoupment from a person qualifying under § 204(b) would not be "proper."*

Id. at 694 (emphasis added).

Therefore, this Court has read the statute as forbidding recovery from blameless individuals who qualify for waiver, and as requiring that a waiver determination must always precede any recovery.[15] 42 U.S.C. § 404(b). As the

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waiver hearing violated a beneficiary's right to procedural due process. *See, e.g., Mattern* v. *Mathews*, 582 F.2d 248 (3d Cir.), *cert. denied*, 443 U.S. 912 (1979). This constitutional issue was raised in the complaint and argued in Plaintiffs' Summary Judgment Brief, but was not reached by the District Court or the Court of Appeals.

[15] The only exception to the prerecoupment notice and hearing rights of overpaid beneficiaries concerns disputes involving computational errors in determining the amount of overpayment. The Secretary wrongly characterizes this narrow exception as support for netting, but the netting dispute relates to the deprivation of *waiver* rights. *See Lugo* v. *Schweiker*, 776 F.2d 1143, 1154 n.4 (3d Cir. 1985) (Gibbons, J., dissenting).

Tenth Circuit concluded, "[n]o recovery means no recovery by setoff, and no recovery by suit; no recovery at all." Pet. App. 11a, *quoting Lugo* v. *Schweiker*, 776 F.2d at 1154 (Gibbons, J., dissenting) (footnote omitted).

The legislative history of the waiver statute is consistent with this approach. The waiver provision was originally incorporated into the Social Security Act as part of the 1939 amendments. The statutory language was adopted directly from the House and Senate reports and indicated from the beginning a Congressional mandate to prohibit *all* collection *whenever* waiver was appropriate.[16] Thus, in any instance in which the Secretary sought to recoup funds, a waiver determination was to be made when requested by a beneficiary. Congress intended to protect blameless individuals from any sort of governmental recovery action in the event of excess payments. The purpose, according to the House Report, was to guarantee the waiver of "*any* right of the United States to recover by legal action *or otherwise* in *any* case of incorrect payment to an individual who" meets the requirements of the statute. H.R. Rep. No. 728, 76th Cong., 1st Sess. 42 (1939) (emphasis added).

Nowhere has Congress evidenced any intent to restrict a beneficiary's statutory right to request waiver of overpayments. To the contrary, whenever the Secretary has

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[16] S. Rep. No. 734, 76th Cong., 1st Sess. 51 (1939); H.R. Rep. No. 728, 76th Cong., 1st Sess. 42 (1939). The 1939 amendment provided:

> There shall be no adjustment or recovery by the United States in any case where incorrect payment has been made to an individual who is without fault . . ., and where adjustment or recovery would defeat the purpose of this title or would be against equity and good conscience.

Social Security Act Amendments of 1939, ch. 666, § 201, 53 Stat. 1360, 1368 (1939) (current version at 42 U.S.C. § 404(b) (1982)).

sought to expand his collection efforts, Congress has similarly expanded the waiver protection. For example, in 1967 when Congress amended the recovery statute, § 404(a), to include recovery from individuals receiving benefits on the overpaid wage earner's earnings record, Congress similarly expanded the scope of waiver to protect these newly liable individuals.[17] Recently, the Secretary sought to characterize the recovery of funds erroneously paid to a deceased beneficiary's joint bank account as "errors" rather than "overpayments" in an effort to limit the applicability of the waiver statute. In response, Congress amended the collection statute to clarify its intent that joint bank account owners be protected by waiver.[18] 42 U.S.C. § 404(a)(2) (Supp. IV 1986).

Congress has consistently supported and expanded the beneficiary's right to seek waiver of recovery in every instance in which the issue has been presented. The broad and mandatory language of the waiver statutes unambiguously demonstrates Congressional intent to protect all deserving beneficiaries from collection activity by the government. As the Tenth Circuit ruled, "A setoff such as

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[17] The Secretary was thus authorized to waive recoupment from any person who was without fault, *e.g.*, a child or a spouse. S. Rep. No. 744, 90th Cong., 1st Sess. 257, *reprinted in* 1967 U.S. Code Cong. & Admin. News 2834, 3095-96. *See* Social Security Act Amendments of 1967, P.L. No. 90-248, § 152, 81 Stat. 821, 860-61 (1968).

[18] "The legislative history of section 204(b) indicates that Congress enacted the waiver provision to mollify the often harsh effects of overpayment recovery actions on recipients." 131 Cong. Rec. S8727 (daily ed. June 25, 1985) (Statement of Sen. Heinz). Senator Heinz proposed an amendment to § 404(a) to clarify that automatic electronic transfer payments are overpayments, while observing that he believed that the existing overpayment statute, regulations, legislative history and overall statutory scheme already supported such an interpretation.

that undertaken by the Secretary may be an acceptable practice in a business context; however, business entities are not constrained by mandatory statutory provisions." Pet. App. 11a.

The Secretary's netting policy allows him to do what *Yamasaki* says the waiver statute specifically prohibits, that is, recoup funds from persons who may qualify for waiver. As the district court observed, through the netting regulations the Secretary is attempting an "end run" around both the waiver statutes and *Yamasaki*. Pet. App. 22a-23a, citing *Lugo*, 776 F.2d at 1156 (Gibbons, J., dissenting). The "fundamental flaw" in the Secretary's position, the Tenth Circuit found, is "his disregard of the fact that by netting underpayments against overpayments, he effectively recovers overpayments without complying with the statutory waiver of recoupment provisions." Pet. App. 12a.

B. The Words "Adjustment Or Recovery" Are Defined Broadly To Include Netting.

The respondents contend that the phrase "adjustment or recovery" includes all the collection methods, including netting, which the Secretary may employ to recover overpayments. The Secretary restricts the definition of "adjustment or recovery" to "affirmative methods for collecting past overpayments, either through 'adjustments' in future payments or a 'recovery' in the form [of] a demand for repayment from the beneficiary or his estate." Gov't Br. 18-19. If the phrase "adjustment or recovery" is interpreted broadly to include all collection methods, the Secretary's entire argument falls of its own weight since the Secretary concedes "that no netting may take place until the Secretary has afforded the beneficiary the opportunity to request waiver of the entire amount of the

excess monthly payments considered separately." Gov't Br. 22. On the other hand, insofar as § 404(a) contains the statutory authorization for recovery of overpayments, if netting is not an "adjustment or recovery" there is no statutory authorization for it and it cannot be done at all. Thus, under either interpretation the netting regulations must fail.

The statutory scheme, the plain meaning of the words "adjustment" and "recovery," the way those words have been interpreted by this Court over the years, and the legislative history strongly indicate that administrative offset is encompassed within the terms "adjustment" or "recovery," and that there is little support for the Secretary's narrow interpretation of those terms.

1. Adjustment And Recovery In The Social Security Act.

The Secretary argues that netting is not an adjustment of benefits because adjustment can only mean withholding of future program benefit payments. Gov't Br. 22. To the contrary, adjustment is used throughout the Title II and Title XVI regulations to describe a number of recovery methods. The Title II overpayment regulation, for example, provides that "*adjustments* will be made against monthly benefits *and lump sums*." 20 C.F.R. § 404.502 (emphasis added). The respondents maintain that netting is, in effect, an adjustment against a future lump sum underpayment. Although the Secretary claims "adjustment" refers only to prospective *reductions* in monthly benefits, the regulations provide that underpayments can be "adjusted" through *increasing* monthly benefits. 20 C.F.R. § 404.503. *See also* 20 C.F.R. § 416.535(a). The SSI overpayment "adjustment" regulation provides that an "overpayment is *adjusted* against *any* payment

due the overpaid recipient." 20 C.F.R. § 416.570 (emphasis added). This definition encompasses the netting process, which is an adjustment against a lump sum underpayment. "Adjustment," in fact, is defined so broadly by the Secretary that netting itself is described as an "adjustment" in the Secretary's Program Operations Manual System (POMS):[19] "An underpayment due on behalf of a living person is payable only after *adjustment* for any outstanding overpayment for which the underpaid person is liable." GN 02210.005 (1986), GN 02305.005 (1981) (emphasis added).

Just as "adjustment" is used broadly throughout the Act to describe a variety of changes in benefit payments, "recovery" is similarly broad. Frequently, in fact, "recovery seems to include "adjustment." The 1975 preamble to the SSI regulations, for example, refers to "recovery by adjustment." 40 Fed. Reg. 47,762 (1975).[20] Another POMS provision states, "Even after adjustment (in current pay cases) or recovery (refund, cross-program adjustment, periodic installment payments) has begun," an individual can renegotiate repayment rates. SI 02201.005A.5.d. (1989). The interchangeable terms also appear in the Title II POMS: "the law provides two basic methods of recovery: adjustment against payments due and refund. A third method of recovery is also available, i.e., recovery through legal action by civil suit." GN 02201.701A (1984).

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[19] The Program Operations Manual System (POMS) is an internal agency procedure manual used by the Secretary to assist in making determinations at the initial and reconsideration administrative review levels. It is not used by ALJs or the Appeals Council.

[20] Recovery also appears to be equated with "refund" under the SSI regulations. 20 C.F.R. § 416.560.

Therefore, both the Title II and Title XVI programs use the terms "adjustment" and "recovery" broadly and, at times, interchangeably to describe *any* recoupment of overpayment. This use is consistent with the words' plain meaning and judicial interpretation.

2. Plain Meaning Of Adjustment And Recovery.

The Secretary's argument that netting is not a form of adjustment or recovery ignores the plain meaning of those words as those terms are generally defined and used. "The meaning of the statute must, in the first instance, be sought in the language in which the Act is framed, and if that is plain . . . the sole function of the courts is to enforce it according to its terms." *Caminetti* v. *United States*, 242 U.S. 470, 485 (1917).

The dictionary definitions of the terms "adjustment" and "recovery" confirm the broad meaning commonly given to these words. "Adjustment" is defined, *inter alia*, as "a settlement of a claim or debt in a case in which the amount involved is uncertain or in which full payment is not made." *Webster's Third New International Dictionary* (1981). This definition is far broader than a withholding of future program benefits. Similarly, "recovery" is defined broadly as, *inter alia*, "the obtaining in a suit at law of a right to something by a verdict, decree or judgment of court." *Id.* Again, this definition is broader than a demand for a payment from assets in the possession of the recipient or his estate.[21]

[21] The legal meanings of these terms is similarly broad. *See* 2 C.J.S. *Adjustment* 75-76, 76 C.J.S. *Recovery* 171-172. *See also, Wilson Clinic and Hospital, Inc.* v. *Blue Cross of South Carolina*, 494 F.2d 50, 54 (4th Cir. 1974) (adjustment under the Medicare Act includes offsetting of overpayments against underpayments).

Long before the Social Security Act was enacted in 1935, this Court dealt with the concepts of adjustment and recovery, which often arose when the government paid a private party for one transaction and then later discovered that party had been overpaid. The government then sought to adjust or recover the overpayment by deducting monies due the same private party in separate transactions. *Gratiot* v. *United States*, 40 U.S. (15 Peters) 336 (1841). These administrative offsets were clearly considered to be a form of adjustment or recovery.

In 1887, the Court specifically recognized the concept of "adjustment." *United States* v. *Burchard*, 125 U.S. 176 (1887). In that case, an engineer sued the government for compensation and the government counterclaimed to recover a $425 overpayment. The Court noted:

> But in reality the account had never been closed, and was always open to *adjustment*. Overpayments made at one time by mistake could be corrected and properly charged against credits coming in afterwards.

Id. at 180 (emphasis supplied).

A decade later, the Court surveyed 40 years of precedent sanctioning the use of administrative offsets to recover debts owed to the government. In so doing, the Court recognized that administrative offset was a form of recovery:

> Money paid in violation of law upon balances certified by the accounting officers generally may be *recovered back by counterclaim or otherwise* where no peculiar circumstances appear to make *such recovery* inequitable and unjust.

Wisconsin Central Railroad v. *United States*, 164 U.S. 190, 211 (1896) (citation omitted, emphasis supplied).[22]

[22] *See also Sutton* v. *United States*, 256 U.S. 575 (1920) (administrative offset by Comptroller held proper way "to recover money"). 256 U.S. at 580.

Historically then, "adjustment" was not limited to future changes in monthly benefits and "recovery" was not limited to "refund."

3. Legislative History Of Adjustment And Recovery.

The legislative history supports the broad usage of the terms "adjustment" and "recovery" in §§ 404(a) and (b). Since 1939, Congress has mandated separate treatment of overpayments and underpayments because of its overriding concern that waiver rights be afforded to overpaid claimants. As the Senate Finance Committee noted, "Provision is made for making more equitable the recovery by the Federal Government of incorrect payments to individuals." S. Rep. No. 734, 76th Cong. 1st Sess. 20 (1939). Congress was concerned with assuring that waiver rights would be afforded to beneficiaries and the terms "adjustment" and later "adjustment or recovery" were simply used to refer to the means for correcting any error.

Similarly, the Title XVI provision, 42 U.S.C. § 1383(b)(1)(A), provides for "proper adjustment or recovery" subject to waiver provisions. As with the Title II statutes, Congress intended that adjustment or recovery be considered in tandem with waiver rights, and that the phrase "adjustment or recovery" should be broadly interpreted.

This broad meaning is clear from the Title XVI amendments made in 1986, when § 1383(b)(1)(A) was revised to add provisions regarding recovery of overpayments received by certain surviving spouses, and disabled or blind children. The language of the statute was modified so that the term "proper adjustment or recovery" applied not only to "appropriate adjustment in future payments" and "recovery from such individual or his eligible spouse (or from the estate of either)," but to "*payment* to such

individual or his eligible spouse . . . ." P.L. No. 99-643, § 8, 100 Stat. 3574, 3579 (1986). This change made clear that the term "proper adjustment or recovery" was inclusive and referred to all methods of dealing with overpayments or underpayments.

The legislative history of Title XVI, as well as the legislative history of Title II, reinforces the view that the phrase "adjustment or recovery" in both statutes was intended to include all methods of collection.

C. The Phrase "More Or Less" Refers To The Differential Treatment Of Overpayments And Underpayments Rather Than To A Netting Period.

After asserting that the validity of the netting regulations hinges on excluding netting from the definition of "adjustment or recovery," the Secretary posits that the netting regulations are an embodiment of his authority to determine whether "more or less" than the correct amount of payments has been made to beneficiaries. Gov't Br. 13. Respondents contend that the phrase "more or less" simply refers to the "differential treatment of overpayments and underpayments" found by the Tenth Circuit in § 404(a). Pet. App. 11a. The Secretary must determine pursuant to Section 404(a) whether more than a correct payment was made in a month or less than a correct payment was made in a month. Correct or incorrect payments cannot be determined on an ill-defined periodic basis.

Erroneous payment determinations are made monthly on the basis of the circumstances of individual beneficiaries within a month, such as income, disability status, family composition, and the amount of benefits paid. Monthly accounting, rather than periodic accounting, is the method of erroneous payment determination actually

employed by the Secretary in virtually every instance other than netting; and even in netting cases, monthly accounting is the first step and netting is the second. Netting is a recovery procedure, and does not involve the detection of error in the first instance.

Nearly all the Title II and Title XVI programs are monthly benefit programs.[23] *See, e.g.*, 42 U.S.C. § 402(a), § 402(j); 42 U.S.C. § 1382(c)(1); 20 C.F.R. § 404.301 *et seq.*; 20 C.F.R. § 416.501 *et seq.* The monthly accounting method appears throughout the regulations.[24] For example, 20 C.F.R. § 416.536(a) states that an underpayment is non-payment where payment for *a month* is due. Under § 416.536(b) an underpayment is payment of less than the amount due for *any month*. Similarly, 20 C.F.R. § 404.501 defines various circumstances where adjustment applies, and these instances are all described in terms of "a month" or "any month." Finally, § 404.502 provides that "upon determination that an overpayment has been made, adjustments will be made against monthly benefits and lump sums. . . ."

Rather than a monthly accounting period, however, the Secretary has established what Judge Gibbons described as a "completely artificial definition of the period for cal-

[23] The SSI program, although always paying monthly benefits, originally calculated income on a quarterly basis. That provision was changed, however, in 1985 to require the counting of income on a monthly basis as well. *See* 50 Fed. Reg. 48,573 (1985). *See also* 20 C.F.R. §§ 416.200, 416.1100.

[24] The Secretary keeps payment accuracy statistics regarding the erroneous overpayments and underpayments made to individual beneficiaries based on a monthly sample. *See* GAO Report at 13. Therefore, the Secretary, in his internal agency practices, as well as in the statutes and regulations, differentiates between monthly overpayments and underpayments.

culation of overpayments and underpayments." 776 F.2d at 1155, cited by District Court, Pet. App. 21a. This artificial accounting period lumps together separate months of overpayments and underpayments to achieve a "net" erroneous payment.

There is no support in the legislative history for the view that Congress intended the Secretary to have unfettered discretion to use an open-ended "period"[25] rather than monthly accounting to determine whether more or less than the correct amount of benefits had been paid. The Secretary seeks to make much out of the 1935 statutory language which provided for a determination of overpayments over the lifetime of an individual and recovery from his estate if the overpayment, over his lifetime, was a certain amount. Gov't Br. 25. Although this recoupment provision may be loosely characterized as a form of netting, this language lends no support to the Secretary's position since it was later amended. The 1939 amendments to the statute rejected the 1935 approach of calculating overpayments over the lifetime of an individual and replaced that with recovery of overpayments from future monthly benefits. These changes were consistent

[25] Only the Title XVI regulations define the word "period" as a particular length of time within which to determine whether "more or less" than the correct amount has been paid. 20 C.F.R. § 416.538. The Title II regulation, 20 C.F.R. § 404.504, does not use the word "period" at all. It is only by virtue of SSR 81-19a that the Secretary has stated that the Title XVI regulations and procedures apply to Title II proceedings. In addition, the word "period" itself does not appear at all in the Title II or Title XVI statute. The Secretary has utilized that word in the Title XVI netting regulation, as well as in the companion regulation, 20 C.F.R. § 416.543, which states that underpayments may be used to reduce overpayments in a different period unless waiver of recovery has taken place.

with the movement of the program in all respects into a monthly program.[26]

In the absence of any evidence that Congress contemplated that the Secretary would offset overpayments against underpayments during indefinite "periods," the Secretary cannot be considered to have been given blanket authority to determine netting periods, rather than use monthly accounting, when to do so is in express derogation of the statutory waiver provisions.[27]

D. If The Words "Adjustment Or Recovery" Are Defined Narrowly, Then Netting Is Not Authorized At All Under § 404(a).

Section 404(a) provides the exclusive procedure for recovering overpayments. Thus, if one adopts the Secretary's view that the term "adjustment or recovery" must be construed narrowly so as not to include netting, it follows ineluctably that there is no statutory authority for the netting procedures. Section 404(a)(1) limits the Secretary's options in correcting incorrect payments to: (1) decreasing payments to which the person is entitled; (2) requiring the overpaid person or his estate to issue a refund; or (3) decreasing payments to which the estate or another person on the same earnings record is entitled. Netting is not included as a procedure under the § 404(a)(1) options. If less than the correct amount was paid, the Secretary is to pay the balance to the underpaid

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[26] The 1939 amendments also changed survivors' benefits from a lump sum benefit to a monthly payment. Social Security Amendments of 1939, Ch. 666, Title IX, § 902(g), 53 Stat. 1400.

[27] The statutory "more or less" language must be considered *in pari materia* with the waiver language in order to produce a harmonious interpretation of the overall statutory scheme. *See United States* v. *Morton*, 467 U.S. 822, 828 (1984).

individual, or if the individual has died, payment should be made in the manner specified in 42 U.S.C. § 404(a)(1)(B).

The legislative history of § 204 of the Act indicates that Congress recognized § 204 procedures as the exclusive means of correcting underpayments and overpayments. The original statute provided only for recovery from the estate of an overpaid individual. In 1939, Congress revised the statute to allow for recovery from future benefits due an overpaid individual, but with clear provision for waiver. Congress saw § 204 as the exclusive means for correcting program errors and when what was specifically provided in the statute was too narrow, Congress then amended the statute to give the Secretary another means of recovery.

Congress modified 42 U.S.C. § 404(a) in 1968 to permit the Secretary to require a refund or to seek recovery from others who receive benefits on the earnings record of the overpaid individual. Social Security Act Amendments of 1967, P.L. No. 90-248, § 152, 81 Stat. 821, 860-61 (1968). The 1968 changes demonstrate that Congress understood the § 404(a) recovery provisions as limiting the means by which the Secretary could rectify an error. A statutory amendment was required in order to expand the means of recovery to include refund and recovery from other beneficiaries. Congress did not expect the Secretary to recover such overpayments without specific Congressional authorization in § 404.

In sum, if the term "adjustment or recovery" is interpreted broadly to include *all* collection methods, it necessarily encompasses netting, and such netting must be subject to waiver rights. However, if "adjustment or recovery" is narrowly interpreted, as the Secretary

argues, then the Secretary lacks statutory authority to deal with overpayments or underpayments through a netting procedure. The respondents believe that the broader interpretation would permit the Secretary to offset or net overpayments against underpayments, so long as the Secretary allows the beneficiary to request waiver of adjustment or recovery of any overpayment prior to offsetting underpayments.

II. GREAT DEFERENCE MAY NOT BE ACCORDED THE SECRETARY'S NETTING REGULATIONS WHEN THEY ARE INCONSISTENT WITH THE STATUTE OR ARBITRARY AND CAPRICIOUS.

A. The Netting Regulations Exceed The Secretary's Statutory Authority.

As the Tenth Circuit noted, "Because the Social Security Act expressly entrusts the Secretary with the responsibility of implementing the Act by regulation, our review of the disputed regulations is limited to determining whether the regulations are arbitrary and capricious or are inconsistent with the statute." Pet. App. 5a. *See Heckler* v. *Campbell*, 461 U.S. 458, 466 (1983). *See also Bowen* v. *Yuckert*, 482 U.S. 137, 145 (1987). For the reasons indicated in Section I, *supra*, the netting regulations are inconsistent with the statute and the Tenth Circuit's decision should be affirmed.

B. The Determination Of The Netting Period Is Arbitrary And Capricious.

The facts of the five named respondents demonstrate the flaws of the netting regulations and the arbitrary and capricious manner in which the netting period is determined.

In the case of the Everharts, although the netting period was short, the Secretary changed the netting period during the course of this litigation. *See* note 6, *supra*. Before the Court of Appeals, the Secretary argued as follows:

> We believe that the initial determination of payment error and amount in the Everharts' case was not made in December 1984 as indicated in the Everhart Complaint (p. 6) and the government's answer (p. 3). It *appears* to have been made in early 1985. What occurred in December 1984 was a stoppage of December disbursements based on an incorrect determination of their current income.

Gov't C.A. Br. 8 n.8 (emphasis added).

The Secretary apparently has modified his position regarding the end of the netting period because if the initial determination was made in December 1984, the Secretary would have had no right to offset underpayments for January 1985. (Under 20 C.F.R. § 416.538, the period of offset under Title XVI should conclude the month the initial determination of overpayment or underpayment is made.) Now, before this Court, the Secretary transforms what was a cautionary statement into one of allegedly undisputed fact. The Secretary states, "In *January of 1985*, the errors were discovered and the Secretary determined that from August 1984 to January 1985, the Everharts together had incurred a net underpayment of $407, based on total underpayments of $596 and total overpayments of $189." Gov't Br. 6 n.4 (emphasis supplied). Thus, although the Secretary asserts that the netting period ended in January 1985, the record does not support this statement.

Another example of the misapplication of the netting period is the case of Myron Zenick. The Secretary initially

netted an overpayment of $5,357.20 against an underpayment of $9,560, and paid Mr. Zenick a net underpayment of $4,402.80. Complaint p. 9; Answer, p. 1. Again, before the Court of Appeals, the Secretary reassessed his position. The Secretary advised the court:

> It appears that the netting rules may not have been applied (or properly applied) in Zenick's case. If the "initial determination" of an overpayment in his case was made in September 1983 or earlier, the relevant payment error period should have ended at that time. See SSR 81-19a. If so, any overpayment in that period should be separately determined from any payment error occurring subsequently. The agency is currently reexamining Zenick's case.

Gov't C.A. Br. 9 n.9. *See, supra*, at 4 n.7. Mr. Zenick has never been advised about the results of this reexamination.

In Berline Wise's case, the Secretary determined that she had been overpaid in the amount of $25,171 for the period from September 1976 through May of 1983. Wise Tr. 98. The Secretary also determined that Mrs. Wise was due $10,187.40 as an underpayment for Old Age Insurance benefits covering the period of September 1980 through November of 1983. Wise Complaint in Intervention p. 3; Answer, p. 1. The overpayments and underpayments were then netted to the amount of $14,983.70 in overpayments and that amount was subject to waiver. In fact, the netting policy was not applied correctly in Mrs. Wise's case because there was never an initial determination of two mistaken payments in a netting period. *See infra* p. 7. The Appeals Council found that the month of the initial determination of Mrs. Wise's overpayment was December 1983 (Wise Tr. 10), but the record shows there was no initial determination of underpayment until February 1984. Wise Tr. 98. Thus, the overpayment and

underpayment determinations did not occur within the same netting period. If this were an SSI case, there should not have been netting without waiver rights, pursuant to 20 C.F.R. § 416.543, but in a Title II "different period" netting case like this it is not clear that waiver rights are ever afforded to claimants.[28]

Mr. Zwiezen, too, was subject to an arbitrary application of the netting regulations. Mr. Zwiezen was overpaid because of excess earnings during 1978, 1979, and 1981. Yet, it was apparently not until April 19, 1984, that he received an overpayment notice. *Everhart* v. *Bowen*, 694 F. Supp. at 1519. That notice also advised him that he had received a net overpayment of $5,107 after offset of an underpayment which occurred between November 1977 and April 1984. Although this application of the netting regulations was technically correct and consistent with the Secretary's interpretation, it was nevertheless arbitrary since the Secretary waited until Mr. Zwiezen had accrued an underpayment before making an "initial determination" of an overpayment covering a period many years earlier. As a result, Mr. Zwiezen was never afforded an opportunity to seek waiver of the whole overpayment, as he would have done had the Secretary advised him promptly of an alleged overpayment resulting from excess earnings. In this case, the netting period was lengthened considerably by administrative delay. The Secretary's failure to notify Mr. Zwiezen promptly of his apparent overpayment was contrary to the Secretary's own internal policy "to properly resolve overpayments as quickly as possible." POMS, § GN 02201.002 (1985).

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[28] This is not the only difference between the Title II and Title XVI definition of period. *See supra* 8 and 25 n.25. These differences between comparable programs are not supported by the differences in the statutory language and hence are arbitrary.

Even though the Secretary may have acted in good faith, the vice of the netting regulations is that the outcome depends upon *when* the Secretary notifies a claimant of an overpayment or underpayment, rather than the date the Secretary detects that a claimant has been overpaid or underpaid.[29] The netting policies provide for an arbitrary interval between the discovery of an erroneous payment and its formal determination. The timing of the "initial determination" directly affects whether or not netting will occur and whether or not waiver rights will be afforded. *See* 20 C.F.R. §§ 416.538, 416.543. It is not clear whether waiver rights are afforded beneficiaries in different period netting cases in the Title II program.

The trigger for the establishment of the netting period is the "determination" of an overpayment or underpayment, since "[t]he period ends with the month the initial determination of overpayment or underpayment is made." 20 C.F.R. § 416.538.[30] The phrase "initial determination" is a term of art and refers to a formal decision by the Secretary that is then subject to administrative and judicial review. 20 C.F.R. § 404.902(j); § 416.1402(c). Under the Secretary's regulations, once the Secretary makes the "initial determination," notice of initial determination must be sent. 20 C.F.R. §§ 404.904, 416.1404. Therefore, the end of the netting period is arbitrary in that the Secretary controls when the netting initial determination is made. It is possible that an overpayment can remain uncollected for years until an underpayment becomes due and at that moment, the Secretary can make an "initial determination" of overpayment which will then be netted without the provision of waiver rights.[31] Statutory waiver rights should not depend on the timing of administrative decisions.

[29] The SSI netting regulation includes the following:

> Where an apparent overpayment has been detected but determination of the overpayment has not been made (*See* § 416.558(a)), a determination and payment of an underpayment which is otherwise due cannot be delayed unless a determination with respect to the apparent overpayment can be made before the close of the month following the month in which the underpaid amount was discovered.

20 C.F.R. § 416.538 (1985).

[30] Under Title II, however, the netting period apparently ends the month before the month of the initial determination. SSR 81-19a. *See supra* p. 8.

The application of the netting policy to the named respondents as well as the case histories provided by amici curiae American Association of Retired Persons, *et al.*, demonstrates that the netting policy is arbitrary and capricious. Requiring the Secretary to abandon his netting policy would protect beneficiaries from arbitrary and capricious action and, contrary to the Secretary's contentions, would not be administratively burdensome.

III. AFFORDING WAIVER RIGHTS INTENDED BY CONGRESS WILL NOT UNDULY BURDEN THE SECRETARY YET WILL BENEFIT BENEFICIARIES IN THE MANNER CONGRESS INTENDED

A. The Secretary's Brief Describes A Scenario That Is Unnecessarily Burdensome And Complicated.

The elimination of the Secretary's netting policy will not entail a "needless and expensive multiplication of procedural obligations," as the Secretary asserts. Gov't Br. 36. The Secretary alleges that if his netting policy is eliminated, he will be forced to initiate a separate account-

[31] Judge Gibbons observed that the arbitrary application of this "open-ended" netting period could conceivably "involve recapture of overpayments made even a quarter century ago." *Lugo* v. *Schweiker*, 776 F.2d at 1155 (Gibbons, J., dissenting).

ing system to determine an individual's underpayments and overpayments, as opposed to merely the net figure.[32] This argument is illogical on its face. Of necessity, the Secretary must conduct a separate accounting, that is, make a month-by-month overpayment or underpayment determination before he can institute netting. This fact is recognized by the Title XVI POMS which states: "[T]he determination of underpayment or overpayment is the result of netting the month-by-month results for the entire period." SI 02101.001C.3.a. (1988). Therefore, it is incorrect to assert that affirmance of the Tenth Circuit will require additional accounting steps.

Moreover, the Secretary will not need to develop new notices explaining the overpayment and underpayment amounts and the right to waiver, since the Secretary already has a Title XVI regulation which requires such notices.[33] 20 C.F.R. § 416.558. This provision needs only

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[32] There is some indication that the Secretary has, in fact, already developed a proposed netting notice and procedure. A January 1989 SSI POMS Transmittal appears to concede that prerecoupment waiver notice must be provided prior to netting. SI 02201.015B.3. (1989). This provision states that the Secretary must "notify the overpaid individual of a proposal to withhold an underpayment to recover an overpayment. The netting proposal will be a part of the initial overpayment notice." The transmittal notice attached to this provision states, "This transmittal is a rewrite of existing POMS instructions, policy changes have not been introduced." *Id.* An initial overpayment notice must include waiver rights. GN 02201.05B.4 (1983). *See also* 20 C.F.R. § 404.502a.

[33] The Secretary's concern that each month he could be required to send a separate overpayment or underpayment notice (Gov't Br. 36 n.16) is baseless. The Tenth Circuit specifically rejected such an outcome by finding "reasonable" respondents' position that one notice containing a separate breakdown of all overpayments and underpayments would be sufficient under the statute. Pet. App. 12a n.5.

to be extended to all Title XVI and Title II recoveries. Therefore, most of the procedures, notices and practices are already in place to implement the Tenth Circuit decision.

The Secretary also claims that if his netting policy were eliminated he would "automatically be required to reimburse beneficiaries for any overpayments." Gov't Br. 35. Neither the District Court nor the Tenth Circuit required the automatic reimbursement of underpayments. The District Court simply ordered that the claims of the named plaintiffs and intervenors be remanded to the Secretary for calculation of their overpayments and/or underpayments, without application of the netting methodology. Pet. App. 18a.

The district and appellate courts never specifically advised the Secretary which procedures to employ to implement the overpayment recovery program after the elimination of the Secretary's netting policy. Although one approach could be the immediate and automatic reimbursement of all underpayments, an equally plausible alternative would be to hold underpayments for a period of time, e.g., sixty days, while the beneficiary is notified of the overpayment and underpayment.[34] The beneficiary could then select among several alternatives including:

(1) appealing the amount of the overpayment; and/or

(2) appealing the amount of the underpayment; and/or

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[34] Additional approaches are also plausible. *See* Note, *Social Security Netting Regulations: Balancing Administrative Convenience With the Rights of Beneficiaries*, 72 Minn. L. Rev. 1143, 1162 (1989).

(3) requesting waiver of all or some of the overpayment; and/or

(4) requesting offset of some or all of the overpayment by some or all of the underpayment.

If alternative (4) were selected, or waiver promptly denied, the Secretary could recover the overpayment through netting, and if the overpayment exceeded the underpayment there would be no need for reimbursement of the underpayment. The significant difference in this procedure, of course, would be that the beneficiary would be afforded prerecoupment waiver notice and appeal rights, unlike the current netting practice.

According to the Secretary, only 6% of all overpaid beneficiaries request waiver. Gov't Br. 38 n.19. There is no reason to presume that if beneficiaries subject to netting are notified of their overpayments, a greater percentage will seek waiver. Since a beneficiary must establish both that he was not at fault in creating the overpayment and that he cannot afford to repay the overpayment (*see* 20 C.F.R. §§ 404.508 and 416.553) very few waiver applicants will meet the statutory criteria. It is likely that many potential netting beneficiaries will not qualify for waiver simply because the fact that they are due an underpayment may mitigate their claim of financial hardship. The Secretary would retain the same right he now has to recoup overpayments from future benefits or otherwise, after a waiver denial determination has been made. *See, e.g.*, 20 C.F.R. §§ 404.502, 404.515, 416.560 and 416.570. Therefore, there is no reason to assume that elimination of this netting policy will impair the Secretary's ability to collect overpayments.[35]

[35] The Secretary has repeatedly sought to justify netting by arguing that its elimination will transform the payment error rules into a

The fact that many beneficiaries may still not qualify for waiver, however, does not make the prerecoupment waiver right a "superfluous" procedure, as the Secretary suggests. Pet. Br. 40. On the contrary, it is precisely to protect the most needy and most vulnerable of the aged and disabled population that the waiver provisions were enacted. Although the Secretary complains that waiver determinations take time and thought (Gov't Br. 39-40 n.20), Congress entrusted the Secretary with responsibility to make such thoughtful determinations and the Secretary cannot circumvent such mandated procedures merely because they are time-consuming. "[A]dministrative convenience cannot be countenanced when the netting regulations contravene the plain language of the statute." Pet. App. 11a (footnote omitted).

B. Social Security Beneficiaries Will Be Protected As Congress Intended If The Netting Policy Is Invalidated.

Contrary to the Secretary's representations, netting is an affirmative method of collection which reduces future payments to beneficiaries who may qualify for waiver. Although netting may be "efficient," it is certainly not "fair" in that it singles out those beneficiaries who are owed underpayments and excludes them from the waiver procedure available to all other overpaid recipients. The

device for beneficiaries to obtain windfall payments. The Tenth Circuit rejected this contention:

> That argument is at least somewhat overstated, in that only those overpaid recipients who first request a waiver, and then meet the waiver requirements, are not compelled to repay the excess benefits they have received. Moreover, an overpaid beneficiary who does not have to repay excess benefits is not receiving a windfall, but rather is benefitting from Congress' express provision that recovery must be waived in appropriate situations.

Pet. App. 12a.

benefit to Social Security claimants of eliminating the existing netting policy is clear. Beneficiaries will have the opportunity to request waiver of any overpayments regardless of whether the overpayments occurred in some ill-defined and poorly understood "netting period." All individuals with overpayments will be treated the same rather than under the current system where netting cases are excluded from the waiver procedures.

Although many overpaid individuals due underpayments may not meet the two-part waiver test, the Court of Appeals decision protects those beneficiaries who do. Such beneficiaries will have the right to request that their entire overpayment be forgiven.

CONCLUSION

Netting is an "adjustment or recovery" to correct past erroneous payments. Consequently, netting is barred unless prerecoupment waiver rights are first afforded to beneficiaries. The judgment of the Court of Appeals should be affirmed.

Respectfully, submitted,

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REPLY

BRIEF

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In the Supreme Court of the United States

OCTOBER TERM, 1989

LOUIS W. SULLIVAN, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL., PETITIONERS

v.

SANDRA EVERHART, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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1. Respondents succinctly state the agency's position in this case: the Secretary of Health and Human Services is not required to consider waiver before applying the netting regulations, 20 C.F.R. 404.504, 416.538, because

> (1) waiver procedures are only required when there is "adjustment" or "recovery" and netting is not "adjustment" or "recovery;" and (2) netting is just a way of determining whether "more or less" than the correct amount has been paid.

Resp. Br. 9.

According to respondents, both these propositions are wrong because Congress has "directly spoken to the precise question" of the meaning of the terms "adjustment" and "recovery," see *Chevron U.S.A. Inc.* v. *NRDC, Inc.*, 467 U.S. 837, 842 (1984), and has revealed through the "words, structure, and history of the statutory provisions," Resp. Br. 11, that these statutory terms refer to "all collection techniques," including the setoff of different past errors through netting. Resp. Br. 9.

a. Respondents' efforts to prove that Congress has expressly disapproved the netting procedure are entirely unsuccessful. Their argument consists primarily of conclusory statements supported by disjointed excerpts from the statute, its sparse legislative history, or this Court's opinion in *Califano* v. *Yamasaki*, 442 U.S. 682 (1979). The quoted material restates the unassailable general proposition that an opportunity to request waiver must precede the Secretary's attempts to adjust, recover, or collect overpayments. However, the discussion utterly fails to show that Congress believed the key statutory terms "adjustment" and "recovery" encompass the netting practice, or that Congress has specifically required the Secretary to consider a waiver before adding together past overpayments and past underpayments to calculate the amount to be collected.

For example, respondents state (Resp. Br. 16) that "[t]he broad and mandatory language of the waiver statutes unambiguously demonstrates Congressional intent to protect all deserving beneficiaries from collection activity." However, respondents point to nothing in the history or language of the statute that remotely demonstrates that the "collection activity" from which beneficiaries are to be protected includes the setoff of past errors. Moreover, in asserting that "[n]owhere has Congress evidenced any intent to restrict a beneficiary's statutory right to request waiver of overpayments" (Resp. Br. 15), they likewise beg the question of whether the Secretary's netting practice restricts the right to waiver in a way that Congress did not intend.

b. Indeed, in attempting to rely on legislative history to bolster their view of the statute, respondents reveal their fundamental misunderstanding of the legal principles that govern this case. In arguing that the "legislative history of the waiver statute is consistent" with *their* interpretation of these provisions (Resp. Br. 15), respondents overlook the settled principle that, under *Chevron* and its progeny, a court can only invalidate the *Secretary's* interpretation as embodied in his regulations if that interpretation is *inconsistent* with any permissible reading of the statute. And respondents appear to adopt the erroneous belief that they have satisfied the demands of *Chevron* if they can demonstrate that "[t]here is no support in the legislative history for the view that Congress intended the Secretary * * * to use an open-ended 'period' rather than monthly accounting" (Resp. Br. 25) (footnote omitted). But respondents cannot prevail merely by showing that there is an absence of affirmative support for the Secretary's construction in the legislative history. Rather, they must satisfy the far more demanding requirement of showing that the statute and its history cannot be reconciled with the Secretary's reading of the statutory scheme.

This respondents cannot do. As we explained in our opening brief (at 24-29), the language employed in the successive revisions of the Title II payment correction provisions from 1935 to the present plainly can be viewed as authorizing the calculation of a single past error amount that takes into account *all* errors that have already been made. The 1935 Act directs the SSA, following a beneficiary's death, to find whether the *total* amount paid over a lifetime was excessive, see Gov't Br. 24 n.9, or to determine, while the beneficiary is still alive, whether more than the correct amount has *theretofore* been paid, see *id.* at 24-25. It authorizes posthumous demand for a refund, or reduction in *subsequent* payments to a beneficiary who is still alive. The 1939 Act also speaks of correcting errors by "decreasing subsequent benefits payable" to surviving beneficiaries following death. Gov't Br. 26 n.10. Moreover, contrary to respondents' suggestion, Resp. Br. 25, there is no indication in the 1939 Amendments or those introduced subsequently that Congress intended radically to revise the basic statutory framework established in 1935 by "rejecting" the practice of accounting for, and correcting, a total or net amount of error. Rather, the previous, as well as the current, versions of the Act point to a clear distinction between the past—the period over which

errors are canvassed to calculate an amount of overpayment—and the future—the period during which past errors are corrected out of subsequent disbursements or assets in the beneficiary's possession. Thus, the interpretive materials not only fail to rule out a scheme that takes into account multiple past errors prior to the application of the waiver provisions, but strongly suggest that Congress intended payment errors to be corrected in precisely this fashion.[1]

2. Respondents argue that, if the Secretary is correct that the terms "adjustment" and "recovery" as used in the statute do not encompass retroactive setoffs, then the Secretary "lacks statutory authority to deal with overpayments or underpayments through a netting procedure," Resp. Br. 27-28, and the setoff of past underpayments and overpayments "cannot be done at all" (Resp. Br. 18).

This reasoning is defective for several reasons. First, respondents completely ignore the language of Sections 204(a) and 1631(b)(1)(A) that directs the Secretary to determine whether "more or less" than the correct amount of benefits has been paid. As we have argued, Gov't Br. 30-31, this language provides all the authority that is needed for the practice of netting all previous errors to determine the magnitude of the error that needs to be corrected.

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[1] Respondents seek to rely on the so-called "basic statutory [monthly] accounting period," which Judge Gibbons, in his dissent in *Lugo* v. *Schweiker*, 776 F.2d 1143, 1153 (3d Cir. 1985), identified as precluding the netting of errors from different months. But as we demonstrated in our opening brief (at 19-20) there is no statutory monthly accounting system, and the text of the statutory provisions at issue here make no mention of monthly payments. Besides, if the reason that netting is invalid is that payments must be given month-by-month treatment under every statutory provision, then respondents fail to explain why their proposal for separate treatment for underpayments and overpayments—which is potentially less advantageous for some beneficiaries than strict monthly accounting—satisfies the requirements of the statute. See Gov't Br. 36 n.16.

Second, respondents assert (Br. 27) that the "adjustment" and "recovery" procedures referred to in Sections 204 and 1631(b)(1) are the "exclusive means" available to the Secretary for "correcting underpayments and overpayments," and thus, if netting is not a form of "adjustment" or "recovery," the Secretary has no authority to use administrative setoffs. Respondents err, however, in assuming that, absent express statutory authority, the Secretary would be powerless to rectify payment errors. In fact, no express grant of statutory authority is needed before the government may offset amounts mistakenly paid out against outstanding obligations to the same individual.

This Court has repeatedly made clear that the United States "by appropriate action can recover funds which its agents have wrongfully, erroneously, or illegally paid." *United States* v. *Wurts*, 303 U.S. 414, 415 (1938) (citing *Wisconsin Central R.R.* v. *United States*, 164 U.S. 190, 212 (1896), and *United States* v. *Burchard*, 125 U.S. 176, 180, 181 (1888)). The United States can recapture funds by any of the accepted means of settling a debt—including the subtraction of the overpaid sums from outstanding amounts owed to the same person (*i.e.*, a setoff), or legal action. See *Gratiot* v. *United States*, 40 U.S. (15 Pet.) 336, 370 (1841) ("It is but the exercise of the common right which belongs to every creditor, to apply the unappropriated moneys of his debtor in his hands, in the extinguishment of the debts due to him."); *Wisconsin Central R.R.* v. *United States*, 164 U.S. at 211 ("If * * * money has been paid without authority of law and [the government] has money of the same claimant in [its] hands, [it] is not compelled to pay such money over."); see also *United States* v. *Wurts*, 303 U.S. at 416 (The government has a "long-established right to sue for money wrongfully or erroneously paid from the public treasury" which is not "barred by the passage of time."); *id.* at 415 (quoting *United States* v. *Bank of the Metropolis*, 40 U.S. (15 Pet.) 377, 401 (1841)) ("'No statute is necessary to authorize the United States to sue [to recover

excess disbursements]. The right to sue is independent of statute, . . .'"); cf., *e.g.*, *Wilson Clinic & Hosp.* v. *Blue Cross*, 494 F.2d 50, 52 (4th Cir. 1974) ("Indisputably, the United States can always retrieve moneys misunderstandingly outlaid.").

These authorities suggest that no legislation was necessary to authorize the Secretary to offset past indebtedness (overpayments) against past credits (underpayments), or to sue for a refund. However, Congress chose to provide for specified methods for rectifying errors in benefits payments (legal action, demand for refund, reduction in monthly benefits), some of which might not otherwise have been available,[2] and to place limits on the circumstances under which those very methods could be used. In so doing, Congress created a scheme in which the Secretary could accord different treatment to two types of "setoffs": The setoff of past underpayments against current or future benefits was subject to restric-

[2] An express grant of statutory authority may have been necessary before the Secretary could reduce monthly benefits currently due because it would be possible to construe the statutory provisions setting the amount and conditions of entitlement as barring any reduction of the level of current benefit payments to eligible individuals.

Also, a specific grant of statutory authority may have been needed before the government could collect from one person money unlawfully paid to another person. In this sense, respondents are correct in stating that, when Congress realized that the methods specified in the statute were "too narrow, [it] then amended the statute to give the Secretary another means of recovery" (Resp. Br. 27). In the 1939 and 1967 amendments of the payment correction provisions, Congress expanded the scope of recovery to allow recoupment of overpayments that had been made to the primary Title II beneficiary by adjusting subsequent payments to other individuals receiving benefits on the same earnings record. The 1939 version of Section 204(a) added an authorization to reduce benefits paid to survivors following the death of the primary beneficiary. See Gov't Br. 26 n.10. And the 1967 amendment included a new provision permitting the reduction of benefits paid to others on the same earnings record while the primary beneficiary was still alive but no longer receiving benefits himself. See Gov't Br. 28.

tions. However, the agency was left free to setoff past underpayments against past overpayments at any time.

3. a. Respondents contend (Br. 20-22) that the terms "adjustment" and "recovery" have a plain and definite meaning, and always refer to the setoff of past erroneous disbursements. But the very sources they cite either lend no support to this assertion, or actually undermine it. For example, 76 C.J.S. *Recovery* § 171 (1972), cited in Resp. Br. 20, begins with the statement that "[w]hile it has been said that the word 'recovery' has an established meaning * * * in fact it has several meanings."[3] Likewise, "adjustment" is not itself of precise legal meaning. * * * [I]t has various meanings according to the subject matter where it is used." 2 C.J.S. *Adjustment* §§ 76-77 (1972).[4]

These statements are consistent with the basic observation in our opening brief (at 20-28) that the terms "adjustment" and "recovery" do not necessarily have the same meaning in the payment collection provisions of the statute as they might have in an altogether different setting. The terms need not refer to *all* possible ways of settling accounts or "recapturing" sums erroneously paid out. Although both can be used to refer to a setoff, they can also refer more narrowly to the reduction of future benefits or to the collection of monies that are currently

[3] "Recovery" can be used to refer to the restoration of property by legal action, or, more broadly, to the repossession, receipt, or collection of something in the possession of another by any means. Alternatively, it can mean the vindication of a right to "ret[ain] possession already had and which has not been disturbed."—a definition that would appear to encompass setoff of past errors, where money previously transferred to the beneficiary has already been "repossessed" by the agency through a mistaken underpayment. 76 C.J.S. *Recovery* §§ 171-172 (1972).

[4] *Webster's Third New International Dictionary* 1898 (1976) confirms that "adjustment" and "recovery" can be used to refer broadly to the recapture of assets by a range of methods, or, more narrowly, to recapture by certain specified methods. For example, "recovery" may serve to denote the "obtaining in a suit at law of a right to something;" or it can mean the return of "anything lost * * * in any way."

in the possession of a beneficiary. In short, it is clear that the meaning of these terms can vary, and that the words need not always be given their broadest possible scope.

b. Consequently, it is of no significance that this Court's cases, or even the Secretary's own regulations, might in other contexts treat the terms "adjustment" and "recovery" as interchangeable, or might occasionally use the term "adjustment" to refer to retroactive setoff. See Resp. Br. 18-22. From the fact that these terms may *sometimes*, and in some contexts, take on a broader meaning it surely does not follow that the terms as they appear in Sections 204 and 1631(b)(1) could not have a more restrictive meaning.

For example, respondents suggest that the term "adjustment" as used in the statute must encompass retroactive setoff because HHS regulations refer to certain setoffs other than netting as adjustments. Specifically, respondents point to overpayment regulations under Title II and Title XVI that describe the steps to be taken by the Secretary to correct an overpayment for which a beneficiary is found liable after any netting, if applicable, has taken place and an opportunity for waiver has been provided. See 20 C.F.R. 404.502 (Tit. II); 20 C.F.R. 416.543, 416.570 (Tit. XVI). One of the procedures mentioned in the regulations is a setoff against a "lump sum" payment—that is, a setoff against an underpayment that is due for some past period.[5] Since *some* setoffs of past

[5] See 20 C.F.R. 404.502 (adjustment of net overpayment found due against "lump sum" or monthly benefit under Title II), 416.570 (adjustment of overpayment against "any payment due" to beneficiary under Title XVI); see also 20 C.F.R. 416.543 ("Any underpayment for which an individual is eligible is used to reduce any overpayment determined to exist * * * for a different period."); Program Operation Manual Systems (POMS), GN 02301.020A.2.e (1988) (an underpayment due on behalf of a living person is payable only after adjustment for any outstanding overpayment for which the underpaid person is liable).

The term "lump sum payment" is used to designate the amount of reimbursement that would be payable on an underpayment error that was not included in a particular netting determination, either because the error was made following the close of the netting period, or was made during the netting period but discovered too late to be included in the calculation of the original net amount.

A "lump sum payment" can also be a one-time payment to the widow or widower after the death of a Title II beneficiary. See 42 U.S.C. 402(i). The status of such a payment, for the purpose of applying the waiver provisions, would depend on whether it was currently due or whether it was due in the past but mistakenly left unpaid. If the payment is currently due, a reduction against it would be an "adjustment" within the meaning of the statute, and waiver would have to be offered on any overpayment that would thus be adjusted.

overpayments against past underpayments are described as adjustments under these regulations, respondents argue, it follows that *all* setoffs—including netting—should be treated as adjustments in the statutory sense, which must be preceded by a waiver determination.

Respondents' argument is a complete *non sequitur*. It is to be expected that the overpayment regulations would mention retroactive setoffs as one of the means by which the Secretary may reduce or eliminate an overpayment for which the beneficiary is found to be liable (after netting and an opportunity for a waiver). Once the Secretary has complied with all statutory requirements, he may recapture the amounts due by *any* means available—including the specific types of "adjustment" and "recovery" referred to in the statute, which are only available once the waiver provisions have been applied, or retroactive setoff, which is available to the Secretary at any time regardless of whether waiver has been considered or denied.[6] Thus, it should be apparent that the

[6] Because the Secretary interprets the statute only to bar reductions in future benefits or demand for refund before a waiver is considered, the agency may, at any time, effect an administrative setoff—that is, the agency may always apply a net overpayment against "lump sums" determined to be owed the beneficiary on past underpayments. No consideration of waiver need precede this procedure.

However, under the netting and overpayment recovery regulations, see note 5, *supra*, any error (*e.g.*, an underpayment) that might be made in months after a netting period has closed cannot

term "adjustment" is used in these overpayment regulations simply because it provides an effective way to refer to a number of the procedures that are available to reduce overpayments after the Secretary has applied the waiver provisions. From the fact that the Secretary, for reasons solely of convenience, chose to use the term broadly in selected regulations, it plainly does not follow that retroactive setoffs qualify as "adjustments" under the statute, and that such setoffs are barred prior to a waiver opportunity.

4. a. Respondents claim that the netting regulations are arbitrary and capricious for two reasons. First, they argue that the netting period depends on "*when* the Secretary notifies a claimant of a [net error], rather than the date the Secretary detects [an error]." Second, they maintain that the netting procedure "provide[s] for an arbitrary interval between the discovery of an erroneous payment and its formal determination"[7] (Resp. Br. 32).

be applied against a net overpayment from the closed period unless waiver of the overpaid amount has already been considered. To the extent that the regulations thus bar the setoff of errors from different netting periods prior to consideration of waiver, they place more stringent limits on the Secretary's freedom to deal with past errors than the statute would require. But the fact that the regulations do not go to the limit of statutory power in no way undercuts the validity of the netting regulations.

[7] Respondents correctly note that, under the Title XVI netting regulation, 20 C.F.R. 416.538, the netting period ends the month of the initial determination of an error, whereas, under Title II, see 20 C.F.R. 404.504 and SSR 81-19a (1981), the period closes the month before the month in which the Secretary makes an initial determination. Contrary to respondents' suggestion, there is ample justification for this difference. See Resp. Br. 8 & 31 n.28. The netting period closes one month earlier under Title II because Title II benefits for a given month are paid at the close of the month whereas Title XVI benefits are paid on the first of the month, see 20 C.F.R. 416.502. Hence, the different rule is necessary to insure that errors under both Titles receive uniform treatment, since permitting the Secretary to close the Title II netting period in the same month as an "initial determination" would effectively allow the taking into account of errors made after the initial determination was complete.

Both statements are wrong, and result from a misreading of the regulations.

Respondents observe correctly that the "initial determination" of an error, which marks the end of the netting period, may not always occur in the month an error is first detected or the Secretary initially becomes aware that an error might have been made.[8] Rather, the initial determination takes place only after the Secretary has documented and verified that an error has been made, has reduced any net amount due (or owed) to a sum certain, and is ready to notify the beneficiary and to take steps to correct the error. By the same token, the "initial determination" does not always take place in the month in which the beneficiary receives notice of a net error,[9] since administrative delay in the completion of paperwork can result in the lapse of several months between the initial determination and the date the notice is sent.[10]

[8] Although in our opening brief (at 6) we described the netting period as closing when an error is first "discovered," this is not strictly correct if "discover" is taken to mean that the Secretary merely has some reason to believe that an error might have been made. In some instances, after the Secretary becomes aware of an error in this sense, additional time may be needed to gather information, verify the error, and calculate the exact amount of a discrepancy. If so, the Secretary regards the "initial determination" as taking place at the point at which this process is complete and the agency is in the position to notify or repay the beneficiary.

[9] Respondents are mistaken in their repeated assertion that the "initial determination" takes place when notice is sent to a beneficiary. Although the regulations imply that notice of error sent to a beneficiary is an initial determination, see 20 C.F.R. 404.902, 416.1402, they also state that the initial determination is the "determination *we make* about your entitlement * * * to benefits or about any other matter," 20 C.F.R. 404.900, 416.1400 (emphasis added). See also 20 C.F.R. 404.902, 416.1402 (initial determination is the agency decision that is subject to review), 20 C.F.R. 404.904, 416.1404, 416.558 (notice of initial determination).

[10] In both the Wise and Everhart cases, there was a delay of a few months between the initial determination and notice. In both cases, the Secretary did not take into account any errors that

The Secretary's scheme for making an initial determination is designed to minimize the interval between the "discovery" of an error and its "formal determination." The netting period is closed no later than absolutely necessary to determine and document the actual amount due, and is not arbitrarily prolonged for reasons unrelated to the need to complete the determination. Thus, contrary to respondents' suggestion, the netting regulations, far from providing for an arbitrary interval between "discovery" and determination, are highly protective of beneficiaries by ensuring that the period is as short as administratively possible.

b. Respondents also contend that the netting regulations are arbitrary in the sense "that the Secretary controls when the netting initial determination is made" (Resp. Br. 33). They imply that the Secretary has an incentive to ignore errors, since delay may result in the generation of new errors that can be offset against old mistakes through the application of netting. *Ibid.*; see also Amicus Br. 15. In addition, they claim that the practice of netting unfairly conditions waiver rights on the timing of "administrative decisions."

---

might have been made in that interval, and thus applied the regulations correctly.

The Everharts received a check in January 1985 for net underpayments due for the period August 1984 to January 1985, but were not formally notified of an underpayment error until March 1985. Although the letters the Everharts received did not state when the initial determination took place, they are completely consistent with the conclusion that the netting period ended in January 1985, the very month that the Secretary issued a check to the Everharts covering the period August 1984 to January 1985. See Exhibits B and C (letters of March 26, 1985), attached to Brief in Support of Plaintiffs' Motion for Summary Judgment.

In the case of Berline Wise, the Appeals Council found that the Secretary had made an initial determination of error, which closed the netting period, in December 1983 (Wise Tr. 10). As respondents note, Ms. Wise was notified two months later, in February 1984 (Wise Tr. 98). The Appeals Council found that the Secretary had only taken into account monthly errors through November 1983, see Wise Tr. 98. Therefore, the netting period was closed at the proper time.

As an initial matter, we note that the possibility that the agency might misapply the netting regulations can have no bearing on whether they represent a valid exercise of the Secretary's discretion. For one thing, the agency is entitled to a presumption of good faith compliance with its own regulations. See *FCC* v. *Schreiber*, 381 U.S. 279, 296 (1965); *Fahey* v. *Mallonee*, 332 U.S. 245, 256 (1947). Moreover, if the mere possibility that administrative procedures could be misapplied or abused would render those procedures invalid, few regulations would withstand review. In any event, for reasons of administrative efficiency, fairness and good accounting practice, individual program officers are directed to seek out and rectify errors expeditiously. See, *e.g.*, POMS, GN 02201.005 (1989) (stating Social Security Administration's policy to resolve overpayments as quickly as possible). Moreover, habitual tardiness in correcting errors would not be a particularly effective way for the agency to gain a long-term advantage, since the benefits that can be expected from such a strategy in any given case are entirely speculative. It is impossible to predict whether a beneficiary will continue to be paid benefits, let alone whether new errors will be made or whether they will serve to offset past mistakes.

Respondents' related assertion that the Secretary's netting practice makes entitlement to statutory waiver rights depend on "the timing of administrative decisions" ignores administrative reality. The fact that an overpayment error might come to light sooner (resulting in netting against an underpayment) rather than later (resulting in separate consideration under waiver provisions, because the underpayment has already been paid) stems from the agency's lack of omniscience, not from any premeditated administrative strategy. The agency simply lacks the resources to review and scrutinize every payment a beneficiary has ever received each time an error is discovered. Inevitably, the agency will miss some errors, which may only be picked up at a later time. In sum, the failure to discover some errors until others

have been corrected is hardly the result of deliberate delay, as respondents imply.

c. Furthermore, it is entirely reasonable and consistent with the provisions of the statute for the Secretary to condition the right to seek forgiveness on whether uncorrected errors from the same period are simultaneously outstanding. Although this factor may vary with the timing of discovery, it bears directly on the reason for providing waiver rights. The existence of an outstanding underpayment means that the Secretary can reduce some portion of a past overpayment without reducing *future* benefits or demanding that the beneficiary pay a refund. And, if the setoff results in a net underpayment, the Secretary can avoid such recovery entirely, and there would be no reason to provide a waiver hearing.

In contrast, an isolated overpayment that is discovered after other past errors have been corrected and forgotten can only be collected out of present disbursements to the beneficiary or by requiring the beneficiary to refund the money. An opportunity to seek forgiveness therefore becomes necessary to protect beneficiaries from the special hardships that might result from reductions in payments that may barely be adequate for basic needs, or from the obligation to repay from resources currently on hand. Thus, there are good reasons to accord different treatment to beneficiaries whose errors come to light at different times, even though the pattern of their payment errors may be similar.[11]

[11] Amicus complains that there is great potential for error or unfairness in the application of the netting regulations because beneficiaries are rarely "told that netting has taken place." They complain that even though beneficiaries may "realize that their benefits check is much lower than expected, they have no practical way of determining how or why this has happened." Amicus Br. 8. However, the Secretary's regulations do not permit monthly benefits checks to be "lower[ed]" to recoup overpayments without notice or an opportunity for a hearing. "Lump sum" reimbursements for past underpayments may be lower than "expected," but this would only be the result of a valid application of netting—of

5. In the final section of their brief, respondents attempt to demonstrate that the invalidation of the netting regulations will not impose significant new procedural and financial burdens on the government. Most notably, they insist that "immediate and automatic reimbursement" of all separate underpayments is not required by the Tenth Circuit's decision or by their interpretation of the statute. Rather, they claim, the Secretary need do

which a beneficiary would receive notice—or the proper application of the lump sum against a separate past overpayment amount for which the beneficiary has been found liable after notice and opportunity for waiver. See pp. 8-10 & n.5, *infra*.

Moreover, contrary to Amicus' suggestion, the Secretary's regulations provide for adequate notice of the Secretary's error determinations, and give beneficiaries ample opportunity to challenge applications of the netting regulations in a timely fashion. Net overpaid beneficiaries under Title II must always be notified that a net overpayment has been made, and that waiver is available, before the agency attempts to collect the amount. See 20 C.F.R. 404.502a. Net underpaid beneficiaries receive a reimbursement check and are entitled to be notified under the general provision for written notice of an "initial determination," 20 C.F.R. 404.904. Under Title XVI, the agency is required to notify all individuals receiving benefits on the affected account every time there is a determination of a net overpayment or underpayment. 20 C.F.R. 416.558. Although notices received by beneficiaries under these regulations may not always contain a comprehensive or detailed review of the basis for an initial determination, all beneficiaries may obtain a more detailed explanation by requesting reconsideration of the notice decision. See 20 C.F.R. 404.907, 416.1407; Gov't Br. 32 n.13.

As the case of the Everharts reveals, this scheme enables beneficiaries adequately to monitor and question determinations concerning their benefits accounts. After the Everharts received their net reimbursement check in January 1985, but before their initial notice arrived, they requested reconsideration from the Secretary. In response, on March 26, they received an explanation of the net underpayment, including information concerning the period over which errors were netted. See Exhibits B and C attached to Brief in Support of Plaintiffs' Motion for Summary Judgment. Their subsequent lawsuit was based on an objection to the netting practice, not on any quarrel with the accuracy or correctness of the calculations or of the agency's application of the netting method.

nothing more than notify each individual of underpayment and overpayment errors and offer the option of waiver of the entire, separate overpayment amount. Absent a waiver request, the agency can proceed to net. If waiver is requested, they further assert, the Secretary may consider waiving all or some of the separate overpayment (including only the net amount). See Resp. Br. 36. Only a decision to waive the entire overpayment would effectively bar netting, since the underpayment would then have to be separately reimbursed.

a. Respondents' proposed procedure represents a dramatic shift from their position in the courts below. Before the district court, respondents consistently represened that the statute required immediate reimbursement of the entire amount of underpayments; they adamantly resisted any remedial order that did not involve immediate reimbursement, and opposed the Secretary's request to stay automatic payment to the named plaintiff-intervenors of the netted portion of their underpayment amounts.[12] Respondents never once suggested that an appropriate remedy would consist of an order to the Secretary to consider whether the netted portion of the plaintiff-intervenors' overpayments should be waived, and

[12] See, *e.g.*, Plaintiffs' Brief in Response to Defendants' Motion for Stay of Injunction 5-6 ("[I]f the netting methodology is not applied * * *, the Secretary would be required to remit the netted amounts to the plaintiffs, * * * [and then] to allow the plaintiffs the opportunity to request waiver of the entire overpayment."); see also affidavits from Emil Zweizen and Berline Wise attached as Exhibits A and C to the Brief (requesting immediate reimbursement). See also Plaintiffs' Proposed Order Granting Summary Judgment and Injunctive Relief 2 (submitted by respondents to the district court on February 10, 1987) ("[t]he Secretary shall immediately refund to the named plaintiffs and the plaintiff-intervenor the underpaid funds previously netted and retained by the Secretary").

The district court denied the government's motion for a stay of the injunction as to the named plaintiff-intervenors. Pet. App. 17a-19a. Soon thereafter, all were reimbursed the outstanding portion of their gross underpayments.

then to issue a reimbursement check only if it was decided that a waiver of the entire amount was justified.

b. The scenario now proposed by respondents admittedly would not force HHS to pay out and then attempt to retrieve underpayments that otherwise would have been netted against overpayments. Cf. Gov't. Br. 34-38. Nevertheless, respondents' proposal would still be significantly more difficult to administer than the current system, and would place heavy new procedural burdens on the agency. As noted in our opening brief (at 38), if the present netting procedure were invalidated, the number of persons entitled to request a waiver by virtue of being considered overpaid would automatically double. Given the agency's (very conservative) estimate that 6% of beneficiaries that are eligible for forgiveness can be expected to request it, this would result, at a minimum, in the need to process more than 12,000 new requests for waiver every year. See Gov't Br. 38 n.19. Because the processing of waiver requests is extremely time-consuming, complicated, and labor intensive, see Gov't Br. 38-39 & n.20, this would represent a considerable increase in the agency's workload. Thus, the relief requested by respondents would indeed entail a "needless * * * multiplication of procedural obligations." Gov't Br. 36.

c. Moreover, it is not clear what, if anything, beneficiaries would gain from the additional proceedings that respondents seek. Under the statute, the Secretary has broad discretion to determine the circumstances under which equity and good conscience, or the fundamental goals of the Social Security programs, would warrant the waiver of all or part of an overpayment. In formulating the criteria for waiver, it would be reasonable for the Secretary to assume that any *deliberate* payment of more than the amount to which an individual is entitled would be "against the purposes of the Act." As compared to a waiver of a net overpayment—which would require the Secretary only to forgive an overpayment that has already been made *by mistake*—the waiver of a gross

overpayment would require the Secretary intentionally to pay out more than the correct amount due. It would therefore be permissible for the Secretary always to decline never to waive the entire amount of a gross overpayment, since such a waiver would necessarily require the agency to turn a "method for correcting errors into a method for making errors." Gov't Br. 35.

In addition, the Secretary could sensibly conclude that it would never be against equity and good conscience to refuse to waive the entire amount of an overpayment while simultaneously reimbursing the claimant for an underpayment. As respondents themselves concede, Resp. Br. 36, the fact that a beneficiary would be due to receive a check for a past underpayment necessarily undermines a claim of financial inability to repay the portion of their overpayment that would otherwise have been offset against the reimbursement amount. Because it would not be unreasonable to regard individuals who are about to receive a lump sum from the government as necessarily possessing the means to honor their debt to the government, the Secretary could conclude that waiver of more than the net overpayment amount would never be justified.

In sum, regardless of what the statute requires with respect to the timing of a waiver hearing, it would virtually never be unreasonable, or violate principles of equity and good conscience, to waive no more than a net overpayment in excess of entitlements. And, with very rare exceptions, it would always be well within the Secretary's discretion to treat past overpayments as effective compensation for past underpayments. Hence, application of respondents' newly proposed version of a pre-netting waiver procedure would leave beneficiaries no better off than the current procedure, and the outcome under both schemes would very likely be the same. It follows that there can be no justification for ordering the Secretary to replace the current netting method with respondents' proposed system of "contingent netting." This Court should decline to do so.

For the foregoing reasons, and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

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October Term, 1988

LOUIS W. SULLIVAN, M.D., Secretary of Health and Human Services, et al.,

Petitioners,

v.

SANDRA EVERHART, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF FOR THE AMERICAN ASSOCIATION OF RETIRED PERSONS, FRANK HANSON AND RICHARD WOHNUS, AS AMICI CURIAE SUPPORTING RESPONDENTS

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STATEMENT OF INTEREST

Pursuant to Supreme Court Rule 36, counsel for the petitioners and for the respondents have consented to the filing of this brief amici curiae. Their letters of consent have been filed with the Clerk of the Court.

The American Association of Retired Persons ("AARP") is a not-for-profit membership corporation of more than 30 million persons age 50 and older. AARP is the largest organized group of older Americans in the country. In representing the interests of its members, AARP seeks to: (a) enhance the quality of life for older persons; (b) promote independence, dignity, and purpose for older persons; (c) lead in determining the role and place of older persons in society; (d) sponsor research on physical, psychological, social, economic and other aspects of aging; and (e) represent the point of view of older persons as members of the work force and in retirement. Approximately two-thirds of AARP's members are retired individuals or have never been employed.

Richard Wohnus is a disabled recipient of Supplemental Security Income who is presently seeking to represent a class in a Ninth Circuit-wide challenge to the netting policy which is the subject of this litigation. *Wohnus v. Bowen*, 868 F.2d 1273 (9th Cir. 1988)(table), on remand, No. 86-1602-E (S.D. Cal., class certification motion filed July 24, 1989). Such a class would consist in large part of elderly and disabled persons.

Frank Hanson is a disabled Social Security beneficiary who sought certification of a class in a California-wide challenge to the netting policy. *Hanson v. Bowen*, No. C-88-20421-SW (N.D. Cal., filed July 6, 1988). As in the

case of *Wohnus v. Bowen*, such a class would consist largely of elderly and disabled persons. However, Mr. Hanson's claim has been remanded to the Social Security Administration following a determination that the netting policy had been applied to him by mistake. Mistaken application of the challenged policy is a common problem and one of the subjects of this brief.

SUMMARY OF ARGUMENT

In order to ensure that the recovery of Social Security and Supplemental Security Income ("SSI") overpayments is not unfair and does not leave beneficiaries without any means of support, Congress has provided two statutory limits on the recovery of any overpayment. These are: (1) the general right to waiver of recovery of any overpayment which was not the beneficiary's fault where recovery would produce harsh results, and (2) in SSI cases, the right to have recovery of non-waivable overpayments spread out over a reasonable period of time.

The "netting" policy challenged in this action allows the Petitioner, Secretary of Health and Human Services (the "Secretary"), to ignore these protections in certain circumstances. Specifically, the netting policy redefines the term overpayment by requiring the "netting" of underpayments and overpayments which fall in a broadly defined "netting period." The statutory protections of waiver and gradual recovery are allowed only as to the amount of any overpayment which remains after netting has been applied, regardless of whether the conditions for waiver are met and regardless of whether

gradual recovery of the overpayment would be less harsh.

Since the purpose of these protections is to prevent hardship and inequity, it follows that the netting policy, by preventing the application of the statutory protections, necessarily results in hardship and inequity. This result is in fact reflected in the experiences of beneficiaries. The netting policy is applied to overpayments and underpayments which are years apart and have nothing to do with each other. The netting regulations are nearly incomprehensible, and, as a result, the netting policy is also often misapplied. Netting is frequently accompanied by delays in processing waiver requests and delays in sending out underpayment checks. During these delays, underpayments from which the overpayment is later collected are allowed to accumulate. Netting is applied after waivers have been requested, and even after waiver requests have been approved. Finally, beneficiaries are rarely notified that netting has taken place, leaving them with no way to protest the loss of monies that have seemingly disappeared.

In short, experience, as well as logic, shows that the netting policy subjects beneficiaries to the very hardship and inequity which the overpayment recovery protections were enacted to prevent, and to a host of other abuses as well. The decision of the Court of Appeals for the Tenth Circuit invalidating the netting policy and regulations should be affirmed.

ARGUMENT

I. INTRODUCTION – THE LEGAL MECHANICS OF THE NETTING POLICY

Incorrect Social Security and SSI payments are common and, frequently, the result of agency error.[1] The size of payment errors varies, but even a relatively small monthly error can have a disastrous effect if it is repeated over a period of years.[2] For example, a beneficiary who is overpaid $50 a month for five years will have a potential "debt" of $3,000, the equivalent of roughly one-half of the

[1] A 1987 General Accounting Office study of Social Security Retirement and Survivors benefits criticized the Secretary for overstating payment accuracy rates to Congress. U.S. General Accounting Office Report to Sen. Comm. on Appropriations, Subcomm. on Labor, Health and Human Services, "Social Security: Payment Accuracy Rates are Overstated," GAO/HRD-88-10 at 2-3 (October, 1987). One of several reasons given for the exaggerated accuracy rates was the Secretary's failure to include underpayments as errors. *Id.* at 3. The report concluded that when all detected errors were considered the accuracy rate for 1986 was at best 87.3%, and that disparities in the data suggested that all errors were not being detected – implying an even lower accuracy rate. *Id.* at 3-5. Even without considering undetected errors, the study concluded that one in six of the cases sampled contained an error and that these cases had been in error for an average of five years. *Id.* at 5 and 27.

The study found that underpayments were more common than overpayments and that the average overpayment in 1984 was $1,069.50 while the average underpayment for that year was $591.50. *Id.* at 5 and 27-29.

Most errors, the study found, were attributable to the Secretary rather than to beneficiaries. *Id.* at 15-16.

[2] *Id.* at 29.

annual income of someone living at the federal poverty level.[3]

Because recovery of overpayments often produces harsh results, Congress has provided protections to ensure that recovery of overpayments does not create the very problems that the Social Security Act was enacted to prevent.[4] The principle of these protections is the right to seek waiver of recovery of overpayments. This provision was enacted in the early years of the Social Security Act.[5] The language of the waiver provision is simple, "mandatory," and "expressly limits" the Secretary's authority to recover overpayments.[6] The statute states that repayment "shall" be waived (1) where the beneficiary was "without fault," and (2) where collecting the overpayment would either "defeat the purposes" of the Social Security Act or be "against equity and good conscience."[7] In addition,

[3] Annual Update of the Poverty Guidelines, 54 Fed.Reg. 7097, 7098 (Feb. 16, 1989).

[4] The Social Security Act was designed as a "comprehensive and constructive attack on [economic] insecurity." H.R.Rep. No. 615, 74th Cong., 1st Sess., 3 (1935).

[5] The Social Security waiver provision was enacted in 1939, shortly after the inception of the Social Security Act. 42 U.S.C. § 404(b). The SSI waiver provision was enacted when the SSI program was created in 1972. 42 U.S.C. § 1383(b)(1)(B)(i).

[6] *Califano v. Yamasaki*, 442 U.S. 682, 685 and 694 n. 9 (1979).

[7] 42 U.S.C. §§ 404(b) and 1383(b)(1)(B)(i).

Congress has limited the rate at which SSI overpayments may be recovered.[8]

This action challenges the Secretary's "netting" regulations. These are regulations which allow the Secretary to bypass the statutory limitations on recovery of overpayments by requiring the offsetting of any overpayments and underpayments that fall within what is termed a "netting period." Beneficiaries are allowed to seek waiver or gradual recovery only as to the amount of any overpayment which remains after netting has occurred.[9]

The term "netting period" is not defined to mean overpayments and underpayments that are in some sense contemporaneous. Rather, it is defined so broadly as to allow offsetting of underpayments and overpayments that occur years apart and have nothing to do with each other. The period begins with the month in which an underpayment or overpayment (whichever came first) occurs. The period closes in the month in which the formal "initial determination of underpayment or overpayment is made,"[10] – an event which often does not occur until months or years after the Secretary has been made aware of the error in question.

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[8] In most circumstances, the amount by which a current check may be reduced to recover an overpayment is limited to 10% of the beneficiary's current monthly income. 42 U.S.C. § 1383(b)(1)(B)(ii).

[9] 20 C.F.R. §§ 404.504 and 416.538.

[10] 20 C.F.R. § 416.538. This definition of the netting period appears in the SSI, but not the Social Security, netting regulations. However, the SSI definition is applied to Social Security cases as a matter of policy. Social Security Ruling (SSR) 81-19a.

(Continued on following page)

The typical netting case involves a beneficiary who has a period of disability that ended sometime in the past and who has reapplied for benefits. The second application may be occasioned by a recurrence of a disability or by reaching retirement age, or it may result from the common practice of Social Security claims workers encouraging persons who believe their benefits have been terminated incorrectly to reapply rather than appeal the termination. If the new application is approved, the beneficiary is often entitled to a retroactive check for benefits which have accumulated during the period between the time that the new application was filed and the time that it is granted. This retroactive check is considered an underpayment.

However, before issuing the underpayment check, the claims worker will review the claimant's records, looking for any previously undiscovered overpayments.[11] Since the beneficiary has never been notified of any overpayment from the first period of disability, the netting period for such overpayments, according to the Secretary, has never "closed." As a result, the netting period on the old overpayment encompasses the current underpayment, and the two sums will be offset. The beneficiary will be given an opportunity to seek waiver only of the

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(Continued from previous page)

See also Program Operations Manual System (POMS) § GN 02201.025 (1985).

"Initial determination" is a term of art in the Social Security regulations, referring to the formal notice which is sent to a beneficiary to inform him of the existence of an overpayment and his appeal rights. 20 C.F.R. §§ 404.902 and 416.1402.

[11] *See* POMS SI 02101.002A.1. (1988).

amount of any overpayment that remains, if any, regardless of the equities or hardships involved, regardless of whether the overpayments and underpayments are years apart,[12] and regardless of whether the waiver has been requested or even approved.[13] In SSI cases, the beneficiary is also deprived of the statutory right to have recovery of the overpayment spread out over a reasonable time period.

Compounding these problems is the hidden nature of the netting policy. Because the Secretary does not consider amounts which are netted to be overpayments at all, he recognizes neither any obligation to inform beneficiaries that netting has occurred[14] nor any obligation to provide the prerecoupment protections which normally attach to recovery of overpayments.[15] Beneficiaries are rarely told that netting has taken place, and even if they realize that their benefits check is much lower than expected, they have no practical way of determining how or why this has happened. In most cases, for all practical purposes, the benefits simply disappear.

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[12] *See e.g.*, the cases of Myron Zenick and Berline Wise in *Everhart v. Bowen*, 853 F.2d 1532, 1534 (10th Cir. 1988), cert. granted, 109 S.Ct. 2098 (1989). See also *Lugo v. Schweiker*, 776 F.2d 1143, 1155 (3d Cir. 1985) (Gibbons, J., dissenting).

[13] 20 C.F.R. § 416.538 and POMS § GN 02201.025C., Example 4 (1985).

[14] Recent manual changes may modify this policy in SSI cases. *See infra* note 38.

[15] *See Califano v. Yamasaki*, 442 U.S. 682 (1979).

Another problem for beneficiaries is the complexity of the netting policy and the confusion surrounding its application. As will be shown, the policy is often misapplied. Almost no one, including Administrative Law Judges, the Appeals Council and the Secretary's own attorneys, seems to understand how and when netting is to be applied.

In sum, netting is a confusing policy which deprives beneficiaries of the statutory right to seek waiver, the due process rights associated with waiver, and the right to spread out recovery of non-waivable SSI overpayments over a reasonable period of time, all in situations for which Congress clearly intended these protections to apply.

Since waivers are granted only if recovery would either "defeat the purposes" of the Social Security programs or otherwise violate "equity and good conscience",[16] it follows that hardship and inequity are present in every case in which the netting policy stands between the beneficiary and the grant of a waiver. The purpose of this brief is to show that this result is more than an academic hypothesis. This brief will describe the harsh impact of netting on elderly and disabled persons in specific individual cases, how nearly incomprehensible regulations have led to widespread misunderstanding and misapplication of the policy, how the netting policy encourages delay, and the hidden nature of the netting policy.

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[16] The "defeat the purposes" provision has been interpreted to mean that the beneficiary is impoverished. 20 C.F.R. §§ 404.508 and 416.553.

Although netting is common (the Secretary estimates that "several thousand" cases "arise" each year in the Tenth Circuit alone[17]), the hidden nature of netting makes it impossible to provide precise statistics on the application of the policy. However, those cases which have reached the courts, the examples published in the Secretary's internal agency manuals, and the examples of netting which have come to the attention of amici strongly suggest that the problems illustrated here are typical.

II. THE IMPACT OF NETTING IN ACTUAL PRACTICE.

A. A Typical Case – An Underpayment Offset Against A Previously Undiscovered Overpayment

The circumstance of Richard Wohnus, plaintiff in a California challenge to the netting policy,[18] illustrates a typical netting situation. Mr. Wohnus received SSI on the basis of physical and mental disabilities related to a lifelong history of epilepsy. In 1981, SSA determined that Mr. Wohnus had not been disabled for SSI purposes since 1979, but inadvertently continued to pay Mr. Wohnus benefits until 1982.

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[17] Petition of the Secretary of Health and Human Services for Rehearing with Suggestion of Rehearing *En Banc*, at 10, in *Everhart v. Bowen*, 853 F.2d 1532 (10th Cir. 1988), cert. granted, 109 S.Ct. 2098 (1989).

[18] *Wohnus v. Bowen*, 868 F.2d 1273 (9th Cir. 1989) (table), on remand, No. 86-1602-E (S.D. Cal., class certification motion filed July 24, 1989).

Mr. Wohnus reapplied and during the following two years, while this second application was being appealed, Mr. Wohnus was left without any means of support. He frequently went hungry. He was evicted from his apartment. He was sued for a large sum of back rent. He lost most of his personal belongings, and he survived by staying with family, friends and in shelters.

When the second application was finally granted in 1984, Mr. Wohnus was found to be entitled to a retroactive award for the amount he should have been paid during his years on the streets. At this time, Mr. Wohnus was first notified of the overpayment for the years 1979 to 1982. He requested a waiver. However, before the request was ruled on,[19] his entire retroactive award, the money that should have helped him pay the bills and recover from the other harm that resulted from his years of homelessness, was taken to offset the old overpayment. Mr. Wohnus received no retroactive check, and, except for the relatively small overpayment that remained after netting was applied, no opportunity either to seek waiver or to take advantage of the statutorily limited recovery rates.

Other beneficiaries report borrowing money to survive, relying on the anticipated retroactive payment of benefits to eventually pay their creditors. When the anticipated check is unexpectedly taken by netting, they may

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[19] Mr. Wohnus' waiver request was pending when the netting policy was applied. An example of the netting policy being applied *after* a waiver request has been approved is provided by the *Rolison* case, *infra* at 20-21.

face foreclosure on their home and repossession of their automobile.[20]

B. Frequent Misunderstanding and Misapplication of the Netting Policy – Offsetting Amounts From Different Netting Periods

One of the greatest problems presented by the netting policy is simply understanding the regulations. The Social Security netting regulation is vague and leaves the netting period undefined.[21] Only by reading the Social Security Rulings or the Social Security internal agency manuals can one learn that the SSI definition of the netting period applies to Social Security as well.[22] Furthermore, the sentence in the SSI regulation which sets

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[20] See, e.g., Brief in Support of Motion for Temporary Restraining Order, *Tarver v. Harris*, No. C79-1554A (N.D. Ga. 1980).

[21] The amount of an overpayment or underpayment is the difference between the amount paid to the beneficiary and the amount of the payment to which the beneficiary was actually entitled. Such payment, for example, would be equal to the difference between the amount of a benefit in fact paid to the beneficiary and the amount of such benefit as reduced under section 202(j)(1), 202(k)(3), 203(a), or 224(a), or as increased under section 202(d)(2), 202(m), or 215(f) and (g). In effecting an adjustment with respect to an overpayment, no amount can be considered as having been withheld from a particular benefit which is in excess of the amount of such benefit as so decreased.

20 C.F.R. § 404.504.

[22] Social Security Ruling (SSR) 81-19a and POMS § GN 02201.025A. (1985).

out the effect of the netting policy on subsequent underpayments is nearly incomprehensible,[23] and unnecessarily so.[24]

The result of this confusion is the apparently frequent mistaken offsetting of overpayments and underpayments which do not fall within the same netting period. The netting period is supposed to close with the month that the "initial determination" of overpayment or underpayment is made. In practice, overpayments are netted against underpayments incurred in months after the netting period has closed.

A dramatic example of this problem occurred in the case of Frank Hanson,[25] a disabled Social Security beneficiary who went through the entire administrative appeals process and filed a complaint in federal court

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[23] With respect to the period established, there can be no underpayment to a recipient or his eligible spouse if more than the correct amount payable under Title XVI of the Social Security Act has been paid (whether or not adjustment or recovery of any overpayment for that period has been waived under the provisions of §§ 416.550 through 416.555) a subsequent initial determination of overpayment will require no change with respect to a prior determination of overpayment or to the period relating to such determination to the extent that the basis of the prior overpayment remains the same.

20 C.F.R. § 416.538.

[24] The netting policy can be stated relatively clearly. See 20 C.F.R. § 416.543.

[25] *Hanson v. Bowen*, No. C-88-20421-SW (N.D. Cal., filed July 6, 1988).

without anyone – either the initial claims workers, the reconsideration reviewer, the Administrative Law Judge, the Appeals Council, or the Secretary's own attorneys – recognizing that the underpayment and overpayment in question did not fall in the same netting period.[26] Only when Mr. Hanson filed an amended complaint, seeking to challenge the netting policy on a class basis, did the Secretary decide that netting had been applied in Mr. Hanson's case by mistake and that his claim should be remanded for consideration of waiver.

Another example of offsetting an overpayment and underpayment which arose in different periods is the case of Lucy and Joe Caskey.[27] The Caskeys are an elderly Indian couple residing in Nevada who unintentionally exceeded the SSI resource limit when they sold some cattle. Because they did not understand the income and resource reporting requirements (they speak only Shoshone), they did not report the sale until they were asked about it some months later. A year after reporting the sale, they received an initial overpayment determination. They promptly requested waiver, but before their request was ruled on they were notified that the overpayment was being reduced by underpayments arising in months *after* the initial determination of overpayment. Although the circumstances of this case appear to be similar to those of Mr. Hanson, the Secretary has not acknowledged that this application of the netting policy was a mistake.

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[26] Defendant's Memorandum in Opposition to Plaintiff's Motion for Class Certification, at 15-16, *Hanson v. Bowen*, No. C-88-20421-SW (N.D. Cal., complaint filed July 6, 1988).

[27] Claims of Lucy and Joe Caskey, Nos. 530-32-4572 AS and 530-12-4969 AI. Notice of Change in Payments (June 7, 1989).

C. Delays in Notifying Beneficiaries of Overpayments and in Acting on Waiver Requests

Netting cases often involve delayed processing of overpayments and waiver requests, during which time underpayments (out of which the overpayment may be later collected) accumulate. Amici do not know, and this Court need not determine, whether or not these delays are deliberate. The incentive to ignore overpayments until they can be collected from later underpayments certainly exists, and even if the delays are the result of oversight, the effect on beneficiaries' rights is the same. In the words of one court:

> It is clear that, if the Secretary had deliberately caused the underpayments in order to accomplish recoupment, § 404(b) [the right to seek waiver of overpayments] would have been violated. It cannot be determined from this record whether any of the delay in notifying the plaintiff of the erroneous payments was deliberate. The question before the Court is whether the Secretary may, consistent with the statute, define "overpayment" in such a way as to accomplish through his own error in underpaying a claimant that which cannot be accomplished directly without affording the claimant the right to argue that an overpayment of benefits should be waived.[28]

Delay problems arise in several ways, usually in combination.

First, beneficiaries are often not notified of seemingly obvious overpayments for many years. Because

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[28] *Sweazey v. Bowen*, No. C2-86-1414 (S.D. Ohio 1988) at 8-9, appeal dismissed, No. 88-3495 (6th Cir. Sept. 9, 1988).

notification defines the closing of the netting period, the netting period is open-ended and allows an overpayment to be recovered by withholding later underpayments.[29] This problem is illustrated by the case of Mr. Wohnus, *supra* at 10-11. It is also illustrated by the case of Ms. Sweazey.[30]

Margaret Sweazey was receiving Social Security disability benefits and began what is known as a "trial work period," a 9-month period in which a disabled Title II beneficiary may attempt to hold down a job without risking loss of benefits. Before the trial work period was over, Ms. Sweazey turned 65 and her disability benefits were changed to retirement benefits.

Unlike disability benefits, retirement benefits are subject to reduction for excess income. The Secretary failed to reflect this change in benefits until half a year later, during which time Ms. Sweazey was overpaid. However, the Secretary did not notify Ms. Sweazey of this overpayment until *two years* after the overpayment was discovered.

During the period between discovery of the overpayment and notification, Ms. Sweazey inexplicably failed to receive any of her cost-of-living increases which the

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[29] The Secretary's policy provides that payment of underpayments cannot be delayed for more than one month in order to accommodate netting. 20 C.F.R. § 416.538. However, as these examples illustrate, any provisions which may exist requiring prompt processing of overpayments (*see* POMS § SI 02201.005A.2.b. (1989)) do not seem to be enforced.

[30] *Sweazey v. Bowen*, No. C2-86-1414 (S.D. Ohio 1988) appeal dismissed, No. 88-3495 (6th Cir. Sept. 9, 1988).

Social Security Administration normally adds to a beneficiary's check automatically. The result was an underpayment. Because Ms. Sweazey had not been notified of the old overpayment, the netting period had not closed. The overpayment and underpayment were offset. Ms. Sweazey eventually sought and was awarded a waiver, but only as to the $240 that was left after netting had been applied. In overturning the Secretary's action, the court stated:

> [B]y waiting until almost the entire amount of the original overpayment was recouped before notifying plaintiff that any administrative action of any kind had occurred, the Secretary has effectively denied plaintiff the right to argue waiver as to all but a small fraction of the total overpayment. If the Secretary had simply waited another few months to notify plaintiff of the recoupment, he would now be arguing that there was no overpayment (since it would have been totally recouped through the "netting" process), and therefore nothing to waive.[31]

Second, once a waiver application has been filed, it is not uncommon for the request to languish until decisions on any pending reapplications or appeals are reached. This sort of delay is illustrated by the case of Ladonna Loth.[32]

Ladonna Loth is a California resident who received SSI benefits between 1978 and May of 1980 on the basis of a mental impairment. In 1980, her benefits were terminated. Later that year, an ALJ ruled unfavorably on her

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[31] *Id.* at 8.

[32] Claim of Ladonna Loth, No. 547-56-1717, Decision of Administrative Law Judge (May 27, 1988).

appeal but the decision was sent to the wrong address, and, for some reason, she continued to receive benefits until 1982. In 1983, at a social worker's insistence, Ms. Loth reapplied for benefits. At this time, she was notified of the existence of the overpayment. In 1984 her second application was approved. However, all retroactive benefits were recovered to repay the old overpayment and her outstanding waiver request was not ruled on until *July of 1987*, when Ms. Loth received notice that the old overpayment had been collected and that her waiver request was therefore moot.[33]

D. Offsetting One Beneficiary's Underpayment Against A Second Beneficiary's Overpayment.

The Social Security Act allows the Secretary to collect overpayments by withholding benefits from anyone who is receiving benefits on the same earnings record.[34] For example, overpayments paid to a recipient's spouse or child[35] may be recovered by reducing the benefits of the husband or parent whose earnings record is the basis of

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[33] Ms. Loth subsequently appealed, and in July of 1989 she received a letter from the Social Security Administration waiving the entire overpayment without any explanation.

Another case in which netting was applied after a waiver was requested is now pending in the Fourth Circuit Court of Appeals. *Elvin v. Sullivan*, No. 88-0636-A (E.D. Va., Jan. 10, 1989), appeal pending, No. 89-2647 (4th Cir.).

Yet another example of this problem is the case of Lucy and Joe Caskey, *supra* at 14.

[34] 42 U.S.C. § 404(a)(1).

[35] 42 U.S.C. §§ 402(b), (c) and (d).

the spouse's or child's eligibility. Because this rule can produce inequitable results, the "against equity and good conscience" provision of the waiver statute has been interpreted so that recovery of such overpayments from a person who was not overpaid will be waived when that person lived in a different household from the overpaid individual.[36]

This protection, like the other protections afforded overpaid individuals, is foreclosed by the netting regulations. The Secretary's practice is to net overpayments against underpayments due to any other person on the same earnings record, regardless of whether the regulatory conditions for waiver are met.

An example of this sort of netting is the case of two New Mexico residents, Edna Torrez and her daughter Jessica.[37] Edna Torrez applied for and was granted Social Security wife's benefits on the earnings records of her husband. A month later the Secretary determined that Edna was ineligible and recouped the resulting overpayment from benefits owed to Jessica.

E. Notice Problems – the Hidden Nature of Netting

The Secretary rarely notifies beneficiaries that an underpayment has been reduced by netting, even though

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[36] 53 Fed.Reg. 25481 (July 7, 1988) (codified at 20 C.F.R. § 404.509). *See also Groseclose v. Bowen*, 809 F.2d 502 (8th Cir. 1987).

[37] Claim of Edna Torrez, No. 585-07-3948, Decision of Administrative Law Judge (Feb. 23, 1989).

it would be easy to do so. In cases where netting occurs before the initial determination of overpayment is issued, the beneficiary is told only the final amount of the overpayment or underpayment for each month.[38] In cases where netting is applied after the initial determination of overpayment, the beneficiary will be aware that this underpayment check is less than expected (or has disappeared completely) but will be unable to determine why.

An example of the hidden nature of netting is the case of California resident Dorothy Rolison.[39] In 1987, Ms. Rolison received initial determinations of overpayments incurred in 1985 and 1986. Repayment of both overpayments was subsequently waived. In the meantime, Ms. Rolison had applied for and was awarded retirement benefits entitling her to a retroactive check for periods back to 1983.

The amounts of the overpayment and the pre-1987 underpayment were netted, but the award letter provided no indication that this had been done. Later, an advocate representing Ms. Rolison asked the local Social Security office for copies of Ms. Rolison's work sheets in an attempt to locate a missing check. To the advocate's surprise, a note at the bottom of a work sheet stated, "Although the initial 1985 o/p [overpayment] of $3,643.00 and the 1986 o/p [overpayment] of $4131.00

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[38] In SSI cases, this policy may have been changed by recently issued manual provisions. POMS § SI 02201.015.A.3. (1989).

[39] Claim of Dorothy Rolison, No. 553-16-4485, Notices of Change in Benefits (Feb. 3 and May 6, 1987).

were waived, the subsequent underpayment of $2,469.00 for 1983 and all benefit rate increases prior to 1/87 must be applied to those overpayments. They [the underpayments] cannot be paid to beneficiary."[40] This was the first and only suggestion that several thousand dollars had been taken by netting. If the netting had been done before the initial determination of overpayment, even this file notation would not have existed.

CONCLUSION

The effect of the netting regulations is to create a hidden policy which not only deprives elderly and disabled Social Security and Supplemental Security Income beneficiaries of the statutory and due process protections against harsh recovery of overpayments, but subjects them to delay and misapplication of the policy as well. The decision of the Court of Appeals for the Tenth Circuit should therefore be affirmed.

Respectfully submitted,

PETER KOMLOS-HROBSKY
CATHY VENTRELL-MONSEES

September 1989

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[40] Claim of Dorothy Rolison, No. 553-16-4485, Payment Worksheet (received by Dorothy Rolison May 4, 1989).